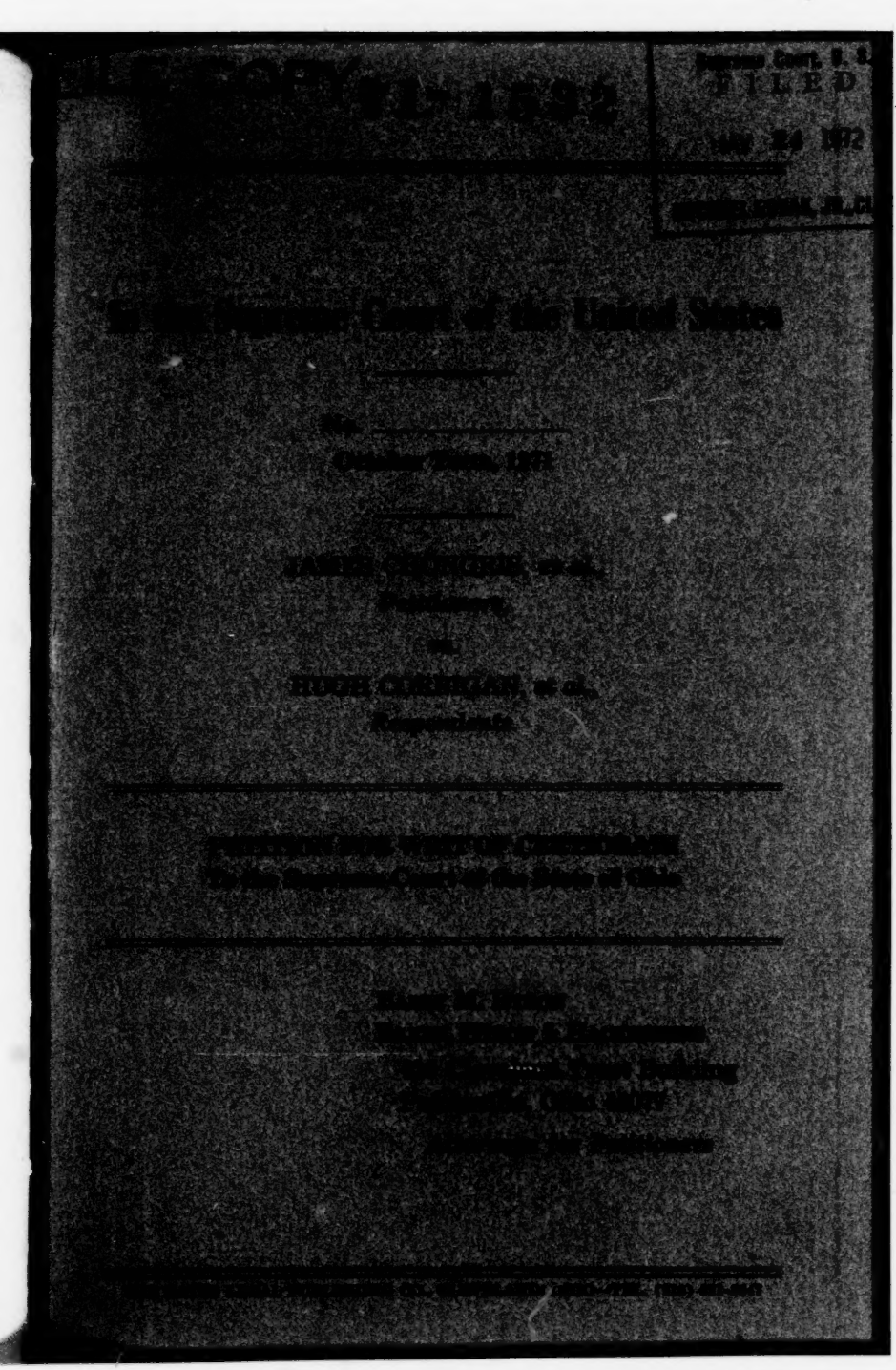

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In the Supreme Court of the United States

No. .....

October Term, 1971

JAMES CHONGRIS, *et al.*,
Petitioners,

vs.

HUGH CORRIGAN, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Ohio was filed on February 2, 1972. This opinion is reported at 29 Ohio St. 2d 39.

The petitioners' request for rehearing was denied on February 25, 1972.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on February 2, 1972, Appendix A, *infra*, page A1. The order denying rehearing was entered February 25, 1972, Appendix A, page A1.

The jurisdiction of this Court is invoked under favor of Section 1257 (3) of Title 28 United States Code.

QUESTIONS PRESENTED

1. Do the Ohio Airport Zoning Statutes, contained in Chapter 4563 of the Ohio Revised Code, violate the Fourteenth and Fifth Amendments to the United States Constitution by taking private property rights from individuals and conferring such rights upon the public for public use without compensation by regulating and limiting the uses of private property and the height of structures and objects of natural growth upon private property adjacent to a public airport?

2. Do the zoning regulations adopted by a county airport zoning board, pursuant to Chapter 4563 of the Ohio Revised Code, conflict with the Fourteenth and Fifth Amendments of the United States Constitution by taking private property rights from individuals and conferring such rights upon the public for public use without compensation by regulating and limiting the uses of private property and the height of structures and objects of natural growth upon private property adjacent to a public airport?

CONSTITUTIONS, STATUTES, ZONING REGULATIONS

The relevant constitutional provisions, statutes and zoning regulations are contained in Appendix B hereto, as follows:

Constitution of the United States, Amendments V and XIV, pp. A38 and A39, *infra*.

Constitution of Ohio, Article I, Sections 1, 16 and 19 and Article XVIII, Section 3, pp. A39 and A40, *infra*.

Ohio Revised Code, Chapter 4563, Airports, Sections 4563.01 to 4563.21 and 4563.99, pp. A40 to A52, *infra*.

Cuyahoga County Airport Zoning Regulations, pp. A52 to A71, *infra*.

STATEMENT OF THE CASE

Presentation of Federal Questions

The question of violation of the Fourteenth and Fifth Amendments was raised in the pleadings upon which the trial court, i.e. the Court of Common Pleas for Lake County, Ohio, heard this case. The allegation of the violation of these constitutional provisions is found in the second claim of the amended petition in this action. These questions were raised at the petitioners' first opportunity in the trial court.

The same questions were raised and argued in the Ohio Eleventh District Court of Appeals. The opinion of the Court of Appeals indicates that its decision declaring the Ohio airport zoning law unconstitutional is based upon its finding of the violation of the Fourteeth Amendment to the United States Constitution. See Appendix pages A27, A28.

The same constitutional issues presented in the trial court and in the Court of Appeals were also presented to the Supreme Court of Ohio. The Ohio Supreme Court in its opinion purported to consider the Federal constitutional issues but refused to apply such constitutional arguments to the facts in the case at bar. In this approach the Ohio Supreme Court ignored the decisions of the Supreme Courts of a number of other states. Also the Ohio Supreme Court refused to apply the doctrine of the cases of *United States v. Causby,* 328 U.S. 256, and *Griggs v. Allegheny County,* 369 U.S. 84.

Statement of Facts

This action was commenced in the Court of Common Pleas for Lake County, Ohio, seeking a declaratory judgment on the constitutionality of the Ohio Airport zoning

law. The petitioners were the plaintiffs in the trial court. The plaintiffs, hereinafter referred to as petitioners, are Mr. and Mrs. James Chongris, who reside at 28960 White Road, Willoughby Hills, Ohio. Mr. and Mrs. Chongris are the owners of the real property where they reside. A co-plaintiff and co-petitioner is the City of Willoughby Hills, Ohio.

The defendants, hereinafter referred to as the respondents, are the members of the Board of County Commissioners for Cuyahoga County, Ohio and all those individuals who comprise the Cuyahoga County Airport Zoning Board of Appeals and Cuyahoga County Airport Zoning Commission.

The petitioners requested in the trial court that Ohio airport zoning statutes and the Cuyahoga County Airport Zoning Regulations be declared unconstitutional and in violation of the Ohio and United States Constitutions.

The Cuyahoga County Airport is owned and operated by the Board of Commissioners for Cuyahoga County, Ohio. This airport is adjacent to Lake County, Ohio and the City of Willoughby Hills. The evidence developed at the trial of the case indicated that the Cuyahoga County Airport owns considerable real estate situated within the the City of Willoughby Hills and Lake County. It was in evidence that part of the property owned by the Cuyahoga County Airport abuts the real property of the petitioners, James and Bessie Chongris.

In 1963 the Cuyahoga County Airport Zoning Commission adopted and promulgated airport zoning regulations purporting to be effective within the airport hazard zone or an area which circumscribed the Cuyahoga County Airport property. The property of Mr. and Mrs. Chongris lies within this airport hazard zone and is in close proximity to the end of the runway of the Cuyahoga County Airport.

The regulations of the Cuyahoga County Airport Zoning Commission purport to limit the right of the owners of property situated within the so-called airport hazard zone to use their property in accordance with existing municipal zoning. Particularly restricted is the "approach zone" or the zone used by aircraft for landings and take-offs at the Cuyahoga County Airport. Because of the proximity to the end of the runway of the Cuyahoga County Airport the property and home of petitioners lies within the approach zone.

The Cuyahoga County Airport zoning regulations limit the height of structures and the heights of "objects of natural growth". These regulations purport to regulate the proximity of buildings to public roads. The regulations prohibit the use of certain undefined types of electrical equipment and lights. These regulations purport to confer upon the Cuyahoga County Airport zoning officials the right to come upon property within the airport hazard zone and install markers and lights upon "non-conforming" objects of natural growth and "non-conforming" structures.

The airport hazard area, which is designated in the Cuyahoga County Airport Zoning Regulations as the area in which such Regulations are effective, is circumscribed by a circle whose center is a point in the center of the Cuyahoga County Airport property. This point extends to the circumference a distance of twelve thousand feet, i.e. the radius of the circle is twelve thousand feet. The airport hazard area obviously comprises a tremendous amount of territory and extends into many municipalities, including that of the co-petitioner, the City of Willoughby Hills.

The City of Willoughby Hills has its own zoning ordinance effective throughout the entire City since 1954. Thus

the home of the petitioners, James and Bessie Chongris, is subject to two sets of zoning regulations.

The airport zoning map describes no uses which may be made of property in any of the zones designated in the map nor does it show what uses are prohibited in any particular zone. The purpose of the zones designated on the airport zoning map is solely to advise the reader thereof of the distance within which a structure may project above the ground. The problem for the reader, however, is that such distance is computed with reference to a point on the Cuyahoga County Airport property and requires an analysis by a professional engineer for a determination of whether or not the object or structure proposed will project into a "clear zone" created by the airport zoning regulations.

Non-conforming objects of natural growth which project into one of the zones created by the Cuyahoga County Airport Zoning Regulations may be cut down by the airport zoning authorities.

It was the position of the petitioners in the trial court, i.e. the Court of Common Pleas for Lake County, the Ohio Court of Appeals, and the Ohio Supreme Court that zoning regulations promulgated by the Cuyahoga County Airport Zoning Board were nothing more than an air easement taken without compensation by the Cuyahoga County Airport in violation of well established principles of eminent domain frequently enunciated in the United States.

The position of the petitioners in all of the Ohio Courts was that the taking of air easements by virtue of the Cuyahoga County Airport Zoning Regulations constituted a violation of the due process clause of the United States Constitution and the Fourteenth Amendment of the United States Constitution since the taking was accomplished by means of state action.

The Cuyahoga County Airport Zoning Regulations have, as their avowed purpose, the taking of private property rights without the payment of compensation therefor. This is done by describing any object which might project into the airport approach zone "an airport hazard" and, as such, "a public nuisance". *Cuyahoga County Airport Zoning Regulations,* Sections 1.6 and 1.8 and *Preamble,* paragraph 2. The prevention of "airport hazards", according to the *Preamble* of these regulations should be accomplished in such manner as to deny the property owners involved any compensation whatsoever. The last sentence of paragraph 2 of the *Preamble* reads as follows:

> "(3) *That the prevention of these hazards should be accomplished,* to the extent legally possible, *by the exercise of the police power without compensation.*" (*emphasis added*)

Thus, by the strange logic of airport zoning, trees become "public nuisances" if their owners permit them a full growth which is an "airport hazard".

The Supreme Court of Ohio is the *only* state supreme court to uphold "airport zoning" since the decision of the United States Supreme Court in *Griggs v. County of Allegheny,* 369 U.S. 84 (1962). The *Griggs* case, of course, applied the Fourteenth Amendment to the United States Constitution to the state in the matter of the unlawful taking of air easements by the states through low overflights into and out of state owned airports. Under the airport zoning scheme involved here the property owner cannot complain of low overflights since *airport zoning* has taken his airspace.

REASONS FOR GRANTING THE WRIT

I. There is a great current public interest in the prohibition of the exercise of eminent domain by the states under the guise of airport zoning laws which confer upon the general public air easements, the property of private individuals.

The law relating to the rights of individuals who reside in proximity to public airports has been under review on two prior occasions in the Supreme Court of the United States. *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962).

The public interest in aviation is a widely known and recognized fact of life in America today. Additionally there has been a tremendous expansion of airport facilities and growth in size of airports. In all those states which have considered zoning for airports since 1962 the general public has been required to bear the expense of the expansion of airports. Now, ten years after the decision of the United States Supreme Court in the *Griggs* case prohibiting the state from appropriating air easements from private property owners by the use of such easements for landing and take-off appurtenances for a public airport, the Ohio Supreme Court has approved a scheme, the practical effect of which is to authorize the state action denied to the state of Pennsylvania in the *Griggs* case.

If Ohio is permitted to accomplish the appropriation of air easements by "zoning regulations", then *all* states will be encouraged to take the same action. This will shift the burden of the expense of airport expansion from the general public to the individual property owner who happens to reside near to a public airport. Surely, this action of the state of Ohio bears close scrutiny and review by the Supreme Court of the United States.

The problems which this Ohio decision may cause are not limited to the borders of Ohio but are truly national in scope.

II. The Supreme Court of Ohio, in upholding the Ohio airport zoning laws and regulations promulgated thereunder, has authorized the violation of the Fourteenth and Fifth Amendments to the United States Constitution by the State of Ohio. This decision directly violates the decision of the United States Supreme Court in the case of Griggs v. County of Allegheny, 369 U.S. 84 (1962) and Ohio is the ONLY state since the Griggs decision whose Supreme Court has found airport zoning constitutional.

The Ohio Supreme Court decision erroneously imposes upon the individual property owner the financial burden of airport expansion. This decision squarely holds that the adoption and enforcement of legislation designated to reduce "airport hazards" (by the imposition of "zoning restrictions") may be accomplished as an exercise of the "police power" of the state of Ohio.

There are many sophistries contained in the reasoning of the decision of Ohio Supreme Court not the least of which is the Court's conclusion that the Ohio airport zoning legislation is bottomed upon the "police power" of the state of Ohio. This flaw in reasoning is shown by the language of Chapter 4563 of the Ohio Revised Code, which limits the application of the law to *publicly owned* airports. Ohio Revised Code Section 4563.01(A). If the basis of "airport zoning" is the state police power and the claimed nexus is a "substantial relation to the public health, safety, morals, or general welfare" (page 46, Ohio Supreme Court opinion) then why should this law "protect" the public only

at and around publicly owned airports? To state the question is to answer it; what is being done is the *appropriation of private property* for the benefit of the general public using *publicly owned* airports.

The Ohio Supreme Court misconstrued the decision of the United States Supreme Court in the case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Ohio Supreme Court understands the *Euclid* case as authorizing a "taking" by the states for police power purposes.

> "In considering the constitutionality of any 'zoning' regulations restricting to any degree the uses to which land may be put, there would appear to be a certain degree of 'taking'. The question of whether there be an *unconstitutional* 'taking', however, involves consideration of the extent or degree to which the landowner's use of his land is limited, and, to an extent, a judicial balancing of the loss of use against the benefits to society thus obtained." (29 Ohio St. 2d 39 at 46)

The *correct* rule as to the existence of a "taking" is found in the case of *Ackerman v. Port of Seattle,* 55 Wash. 2d 400, 408, 348 P.2d 684, 77 A.L.R.2d 1344 (1960).

> "When private property rights are actually destroyed through the governmental action, then police power rules are *usually* applicable. * * * But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable."

In the matter of airport zoning state after state has held that the *imposition* of such regulations upon private property constitutes the constitutionally proscribed taking. *Yara Engineering Corp. v. Newark* (1945), 132 N.J.L. 370, 40 A.2d 559; *Ackerman v. Port of Seattle* (1960), 55 Wash. 2d 400, 348 P.2d 684, 77 A.L.R. 1344; *Indiana Toll Road*

Comm. v. Jankovich (1963), 244 Ind. 574, 193 N.E.2d 237; *Roark v. Caldwell* (1964), 87 Idaho 557, 394 P.2d 641; *Jackson Municipal Airport Authority v. Evans* (Miss. 1966), 191 So.2d 126; and *Sneed v. Riverside* (1963), 218 Cal. App. 2d 205, 32 Cal. Rptr. 318.

Even the lower Ohio courts had adopted the view that airport zoning, as a body of law, was unconstitutional and an unlawful "taking" of private property. The Ohio Common Pleas Court and Court of Appeals have held that airport zoning for the Wright Patterson Air Force Base was not zoning, but rather an unconstitutional taking of air easements. *Hageman v. Bd. of Trustees* (1969), 20 Ohio App. 2d 12 (Montgomery Co., 1969); 23 Ohio Misc. 93 (Com. Pleas, Montgomery Co., 1968)

By the reasoning of the Ohio Supreme Court in this matter the petitioners were not "damaged" because, although the record shows otherwise, they sustained no loss of use of the airspace because petitioners were not physically occupying this airspace. The fallacy *here* is, of course, that it is not necessary that there be a *physical occupation* of property by the owner for eminent domain principles to be applicable. The United States Supreme Court stated the *correct* principle as follows:

> *"The landowner owns at least as much of the space above the ground as he can occupy or use* in connection with the land . . . *The fact that he does not occupy it* in a physical sense—by the erection of buildings and the like *is not material." United States v. Causby*, 328 U.S. 256 at 264. (emphasis supplied)

Thus the Ohio Supreme Court decision is based upon two serious misconceptions of the law. This decision violates the doctrine enunciated by the United States Supreme Court in the *Griggs* case twisting and distorting the doc-

trine to suit a public convenience, the Cuyahoga County Airport.

III. Certiorari should be granted to review the holding of the Ohio Supreme Court to the effect that airport zoning, which seeks to limit the right of property owners in a prescribed area to use their properties in accordance with existing municipal zoning by regulating the height of structures and objects of natural growth and restricts the use of property, is not a taking of private property without compensation even though the Supreme Courts of Indiana, Idaho, New Jersey and Mississippi have all reached contrary decisions and struck down airport zoning in their respective states.

The review of the decision in this matter constitutes the last recourse left to the petitioners. If the decision of the Ohio Supreme Court in this matter is *not* reviewed then all public airports in Ohio and throughout the United States will be encouraged to "zone" for the cost free acquisition of air easements.

The United States Supreme Court has recognized that state action depriving the citizens of the United States of property without due process of law must be prohibited no matter what the motivations of the state may be in its actions.

> "* * * The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifi-

> cation more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. * * *" *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 416 (1922) Justice Holmes.

Ohio should not be permitted a shortcut denied to the state of Pennsylvania in the *Griggs* case, *supra.*

CONCLUSION

For the reasons stated above, it is submitted that the Ohio Supreme Court has failed to accept and apply the doctrine established by this Court relating to the rights of private citizens to their own airspace. The Ohio decision in this matter sows the seeds of a trend whereby the states may ignore the requirements of due process. Such trend should be reviewed before it is permitted further development.

There is widespread public interest in a review of the questions presented in this appeal. Petitioners respectfully urge that this Court note probable jurisdiction and grant this Petition for a Writ of Certiorari.

Respectfully submitted,

BARRY M. BYRON
BAKER, BYRON & HACKENBERG
Counsel for Petitioners

APPENDIX

APPENDIX A

OPINIONS AND JOURNAL ENTRIES

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO ON MOTION FOR REHEARING

(February 25, 1972)

No. 70-764

THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

VILLAGE OF WILLOUGHBY HILLS *et al.*,
Appellees,

vs.

HUGH A. CORRIGAN, *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

OPINION OF THE SUPREME COURT OF OHIO

(February 2, 1972)

VILLAGE OF WILLOUGHBY HILLS ET AL., APPELLEES *v.* CORRIGAN ET AL., APPELLANTS.
[Cite as Willoughby Hills v. Corrigan (1972), 29 Ohio St. 2d 39.]

Airports—Airport zoning regulations—Authority of zoning board to adopt—R. C. 4563.01 et seq.—Airport within municipal territory—Regulations not in conflict

with municipal home-rule powers, when—Injunction or appropriation proceedings available, when—Unconstitutional "taking."

1. Airport zoning regulations, adopted in accordance with the provisions of R. C. Chapter 4563 and designed to reduce "airport hazards," may constitutionally be adopted as an exercise of the "police power" of this state, if such regulations are reasonably necessary to insure the safety of aircraft in landing and taking off and the safety of persons occupying or using the area and the security of property thereon.

2. When it is shown that the enforcement of any airport zoning regulation as to specific property will result in an unconstitutional "taking" of such property, a court may enjoin the operation of the airport zoning regulation as to such property, or may, whichever is more appropriate under the circumstances, direct the institution of eminent domain proceedings for the purpose of compensating the property owner for such "taking."

3. The provisions of R. C. Chapter 4563, to the extent that they authorize the adoption and enforcement of airport zoning regulations within the territory of a municipal corporation, are not unconstitutional as conflicting with the "home rule" powers of that municipal corporation under Section 3, Article XVIII of the Ohio Constitution.

(No. 70-764—Decided February 2, 1972.)

APPEAL from the Court of Appeals for Lake County.

Cuyahoga County owns and operates the Cuyahoga County Airport, a portion of which extends into the village (now city) of Willoughby Hills in Lake County.

In April 1963, the Boards of County Commissioners of Cuyahoga and Lake counties, acting as "the airport zoning board" pursuant to the provisions of R. C. 4563.03(B),[1] adopted certain airport zoning regulations for the "airport hazard area."[2]

In accordance with the provisions of R. C. 4563.03 (A),[3] the board divided the airport hazard area into zones,[4] and within such zones regulated and restricted certain land uses. The regulation provided, within each zone, graduated height restrictions with reference to structures and natural growth and certain use restrictions.[5]

---

1. R. C. 4563.03(B) reads:
"When an airport is publicly owned and any airport hazard area appertaining to such airport is located in more than one political subdivision, the board of county commissioners of each county in which such airport or such airport hazard area may exist, shall constitute the airport zoning board, which shall have the same power to adopt, administer, and enforce airport zoning regulations as provided in division (A) of this section. The board shall elect its own chairman."

2. Defined by R. C. 4563.01(C) as follows:
" 'Airport hazard area' means any area of land adjacent to an airport which has been declared to be an 'airport hazard area' by the Division of Aviation in connection with any airport approach plan recommended by such division."

3. R. C. 4563.03(A) reads, in part:
"* * * Airport zoning regulations may divide an airport hazard area into zones, and, within such zones, regulate and restrict land uses which by their nature constitute airport hazards, and regulate and restrict the height to which structures may be erected or objects of natural growth may be allowed to grow. An obstruction of air space in an airport hazard area rising to a height not in excess of forty feet above the established elevation of the airport, or three feet for each one hundred feet or fraction thereof its location is distant from the nearest point in the perimeter of the airport, whichever is greater, shall be prima facie reasonable."

4. The zones were designated as (1) Runway Landing Areas, (2) Approach Zones, (3) Transitional Zones, (4) Horizontal Zone, and (5) Conical Zone.

5. The use restrictions herein specifically prohibited such uses as would result in electrical interferences with radio communication and lighting which would impair visability or make it difficult to distinguish airport lights, and generally prohibited any use which would "otherwise endanger the landing, taking-off, or maneuvering of aircraft * * *."

In November 1968, the village of Willoughby Hills filed suit in the Common Pleas Court of Lake County, naming as defendants all of the members of the Cuyahoga County Airport Zoning Board, and the members of the "airport zoning commission."[6] Alleging that "the constitutional right of plaintiff exclusively to enact and to enforce zoning regulations within its territorial limits has been infringed," that R. C. Chapter 4563 "violates Section 3, Article XVIII of the Ohio Constitution," and that plaintiff "has been damaged" by the zoning regulations adopted by the airport zoning board, the village of Willoughby Hills sought an order of the court that R. C. Chapter 4563 be declared unconstitutional and that the board be enjoined "from enforcing any zoning regulations within the territorial limits of the plaintiff."

The trial court sustained a motion to make the petition definite and certain by setting "forth facts in what respect the plaintiff Willoughby Hills has been damaged." Thereafter, an amended petition was filed, joining as additional parties plaintiff, James A. and Bessie Chongris and Anton J. and Mildred F. Oblak. The amended petition alleged, *inter alia*, that:

> "13. Plaintiff Willoughby Hills Village has been damaged by the aforementioned activities of defendants in that said plaintiff cannot properly plan and zone for the development of that portion of its territory under the alleged jurisdiction of the Cuyahoga County Airport Zoning Board, said power and duty being imposed upon said plaintiff by virtue of the provisions of Section 713.02 *et seq.* of the Revised Code of Ohio. Additionally, the activities of defendants as aforesaid are causing the property values of

6. See R. C. 4563.05.

real property within the area alleged to be subject to the jurisdiction of the defendants to be depressed, with a resulting loss of tax revenues to said plaintiff.

"14. Defendants wrongfully contend that the real property of the individual plaintiffs is subject to the jurisdiction and regulations of Cuyahoga County Airport Zoning Board, and said plaintiffs have been caused by such contention of the defendants to suffer a diminution in the value of their said real property."

During trial, plaintiffs Oblak were voluntarily dismissed as parties. The trial court, considering the evidence adduced at trial, found "that there is no evidence to support the contention of the plaintiffs Chongris that their property has suffered an impairment of use or a diminution in value by reason of the enactment and enforcement of the Cuyahoga County Airport Zoning Regulations."

As to the plaintiff Willoughby Hills, the trial court found "that there is no evidence of interference with the right of the village of Willoughby Hills under Article XVIII, 3, Ohio Constitution, to control development of the lands and to adopt zoning regulations within its jurisdiction."

The trial court found further that R. C. Chapter 4563 "is a constitutional exercise of state legislative authority and does not violate the Ohio, or the United States Constitution"; that R. C. Chapter 4563 "and the Cuyahoga County Airport Zoning Regulations enacted pursuant thereto, provide for regulations for the operation of public airports and for the safety and welfare of persons, both above and on the ground, and are, therefore, legitimate matters for state legislation and regulations adopted pursuant thereto"; and that the regulations "complement

without nullifying the Village of Willoughby Hills Municipal Zoning Regulations operating within the perimeter of the Airport Hazard Area, and are constitutionally enacted and in compliance with the statutes of Ohio."

The trial court entered judgment in favor of defendants.

The Court of Appeals reversed, finding "that the owners of property located in the 'Airport Hazard Area' in the airspace directly above their property through which airplanes approach and leave the Cuyahoga County Airport, own at least as much space above their property as they can occupy and use"; that R. C. 4563.03, "which creates the power of an Airport Zoning Board to regulate and restrict land uses and the height of structures and natural growth, constitutes a taking of property interest without due process of law and the Cuyahoga County Airport Zoning Regulations issued pursuant thereto, are unconstitutional, being a violation of the due process clauses of the constitutions of the United States and Ohio"; and that the regulations, "enacted under the authority of Section 4563.03 of the Revised Code of Ohio, are not zoning regulations under the exercise of police power, but constitute the taking of private property without compensation * * *."

The cause is now before this court pursuant to the allowance of a motion to certify the record and as an appeal as of right involving a substantial constitutional question.

Mr. Barry M. Byron, director of law, and *Messrs. Baker, Byron & Hackenberg,* for appellees.

Mr. John T. Corrigan, prosecuting attorney, *Mr. A. M. Braun, Mr. Thomas P. Cyrus* and *Mr. Richard A. Goulder,* for appellants.

LEACH, J. The basic question presented by this appeal is whether R. C. Chapter 4563 is unconstitutional on its face.

In essence, such was the conclusion of the Court of Appeals. Such conclusion apparently is based upon the rationale that *all* "airport zoning regulations" adopted pursuant to the authority of R. C. 4563.03 *necessarily* result in an unconstitutional "taking" of private property without compensation, and that such would be true even in those cases where such "taking" resulted in no diminution of property value, and where, so far as airspace is concerned, there is no showing as to the particular property that there is any actual interference with any use which might be considered reasonably necessary for the full use and enjoyment of the land.

The trial court found, as a matter of fact, that the evidence did not show "an impairment of use or diminution in value" of the property of the plaintiffs Chongris. From an examination of the record, it appears that such finding of fact was in accordance with the evidence. The Chongris' property is located in a "Transitional Zone" (contiguous to an "Approach Zone") and, based on the height restriction of the zoning regulation for a "Transitional Zone" (one foot in elevation for each seven feet in horizontal distance), the evidence indicated that such property had an allowable height of 70 feet. The height restrictions of the Willoughby Hills zoning ordinances are 35 feet in a residential single family district. The claim by the Chongris' that the airport zoning regulations preclude them from erecting a TV "tower" or antenna (to receive more distant stations) is negated by the fact that their expressed desire was to erect such to a height of only 45 feet.

The Court of Appeals apparently did not dispute the actual findings of fact of the trial court, but instead took the approach that the "purpose"[7] sought to be served by such "airport zoning regulations" could not be done in the exercise of the "police power" but only by the application of "eminent domain principles."

We do not agree. Instead, we conclude that airport zoning regulations adopted in accordance with the provisions of R. C. Chapter 4563 and designed to reduce "airport hazards,"[8] may constitutionally be adopted as an exercise of the "police power" of this state, if such regulations are reasonably necessary to insure the safety of aircraft in landing and taking off and the safety of persons occupying or using the area and the security of property thereon.[9] When, however, it is shown that the enforce-

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7. The opinion states, *inter alia*:
"It is obviously the purpose of R. C. 4563.03 to provide what amounts to an air easement for approaching and leaving aircraft by interfering with the enjoyment and use of the land laying below."

8. R. C. 4563.01(B) reads:
" 'Airport hazard' means any structure or object of natural growth or use of land within an airport hazard area which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or is otherwise hazardous to such landing or taking off of aircraft."

9. R. C. 4563.07 reads:
"All airport zoning regulations adopted under Sections 4563.01 to 4563.21, inclusive, of the Revised Code shall be reasonable, and none shall impose any requirement or restriction which is not reasonably necessary to insure the safety of aircraft in landing and taking off and the safety of persons occupying or using the area and the security of property thereon. In determining what regulations are necessary, each political subdivision or airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the per cent of slope or grade customarily used in descent or ascent of the aircraft expected to use the airport with reference to their size, speed, and type, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put or is adaptable."

ment of any such airport zoning regulation as to specific property will result in an unconstitutional "taking" of such property, a court may enjoin the operation of the airport zoning regulation as to such property, or may, whichever is more appropriate under the circumstances, direct the institution of eminent domain proceedings for the purpose of compensating the property owners for such "taking."

Applying these principles, and concluding, as did the trial court (but not discussed by the Court of Appeals), that R. C. Chapter 4563 is not, as applicable to the territory also lying within a municipal corporation, violative of the "home rule" provision of Section 3, Article XVIII of the Ohio Constitution, we reverse the judgment of the Court of Appeals and sustain the judgment of the trial court.

No attempt will be made herein to discuss in detail the many cases from other jurisdictions wherein comparable questions have been presented. Most have been digested in annotations in 90 L. Ed. 1218, and 77 A. L. R. 2d 1355 (and A. L. R. supplement thereto). We will, however, outline the basic considerations which lead to our conclusions, as heretofore stated.

It is asserted by appellee that, although designated by statute as airport "zoning" regulation, such "are not in any recognized sense of the word, zoning." Such argument is predicated principally upon a comparison of the purposes sought to be achieved by community zoning and those sought to be achieved by airport zoning regulations. While the purposes may be different, such difference does not impel a conclusion that "airport zoning regulations" may not be adopted as a part of the "police power." In our opinion, the power, or lack of power, to adopt such regulations under the "police power" of the state may not

be determined by its nomenclature. Instead, the test is whether such regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395, 71 L. Ed. 303.

In considering the constitutionality of any "zoning" regulations restricting to any degree the uses to which land may be put there would appear to be a certain degree of "taking." The question of whether there be an *unconstitutional* "taking," however, involves consideration of the extent or degree to which the landowner's use of his land is limited, and, to an extent, a judicial balancing of the loss of use against the benefits to society thus obtained.

In our opinion, the principles stated by the United States Supreme Court in *Euclid* are equally applicable here.[10]

This court, in *Pritz v. Messer* (1925), 112 Ohio St. 628, held, in paragraph one of the syllabus:

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10. The court, in *Euclid*, at page 386, stated:

"* * * Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. * * *

"The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. * * * Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality * * *."

> "Laws enacted in the proper exercise of the police power, which are reasonably necessary for the preservation of the public health, safety and morals, even though they result in the impairment of the full use of property by the owner thereof, do not constitute a 'taking of private property' within the meaning of the constitutional requirements as to making compensation for the taking of property for public use and as to the deprivation of property without due process of law."

Applying the principles of *Euclid* and *Pritz* to the instant case, we think it clear that R. C. Chapter 4563, and any airport zoning regulations adopted in compliance with the requirements thereof, are "laws enacted in the proper exercise of the police power"; that they have a "substantial relation" to the "public safety" and to the "general welfare."

In this case, there was no claim of frequent low flights over plaintiff's land as was involved in *United States v. Causby* (1946), 328 U.S. 256, 90 L. Ed. 1206, and *Griggs v. Allegheny County* (1962), 369 U.S. 84, 7 L. Ed. 2d 585. In those cases, the United States Supreme Court held that frequent low flights over private property may constitute a "taking" if the utility of the land is limited and a consequent diminution in value is suffered. The cases are premised upon the actual invasion of the air space above the land by frequent low flights. The same situation existed in the case of *State, ex rel. Royal v. Columbus* (1965), 3 Ohio St. 2d 154. The syllabus in that case reads:

> "There exists a 'taking' in a constitutional sense of private property for public use under Section 19, Article I of the Ohio Constitution, whenever airflights are so low and so frequent as to be a direct and im-

mediate interference with the enjoyment and use of the land."

We reaffirm the principle applied in the *Royal* case, but find that such principle has no application to the facts of this case.

Plaintiffs assert that the "zoning" cases have no application; that, regardless of whether a landowner has been "damaged," the public may not take "air rights" from the landowner and convert such "air rights" to "its own use." This assertion is premised principally upon language employed by the Supreme Court of Washington in *Ackerman v. Port of Seattle* (1960), 55 Wash. 2d 400, 408, 348 P. 2d 684, 77 A. L. R. 2d 1344: "When private property rights are actually destroyed through the governmental action, then police power rules are *usually* applicable. * * * But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable."

That language from *Ackerman* was approved in *Hageman v. Bd. of Trustees* (1969), 20 Ohio App. 2d 12,[11] the case principally relied upon by the Court of Appeals herein.

Conceding that the Cuyahoga County Airport Zoning Board may not, in the guise of zoning, "convert" to the "public use" the "air rights" of plaintiffs Chongris, the question presented is: What is the scope and dimension of their "air rights"? It is now well settled that the doctrine of the common law, that the ownership of land extends to the periphery of the universe, has no

11. *Hageman* is factually distinguishable in that, there, the airport zoning regulations, in addition to regulating height, purported to regulate population density and concentrations of persons by limiting development to two residences per acre.

place in the modern world. *United States v. Causby, supra* (328 U.S. 256). The opinion in *Causby* states:

> "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport,* 84 F. 2d 755."

Subsequent to *Causby,* the Congress in 1958 amended the definition of "navigable airspace" to read:

> " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." Section 1301, Title 49, U.S. Code (72 Stat. 739).

With reference to such change, the opinion in *Griggs v. Allegheny County, supra* (369 U.S. 84), at page 88, states:

> "* * * But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. * * * Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.' "

In the instant case, the "invasion" of the "superadjacent airspace" has not been shown to have affected either the present use or any reasonably foreseeable use of the land itself, and plaintiffs Chongris continue their use of the land.

From an examination of the *Hinman* case, we conclude that the words "can occupy or use" in connection

with the land, employed in *Causby*, were not intended to imply that, without proof of any actual loss of use, a landowner may prohibit any use of the airspace above his land up to a point where it would be physically *possible* to use such, but where the probabilities of such a use would be remote. In *Hinman*, the court stated, at page 758:

> "We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world."

We conclude that the zoning regulations in question did not take from the plaintiffs Chongris any "airspace" now owned by them. Thus, the question of whether such a "taking" of "airspace" actually "owned" by a landowner would be a "constitutional taking," in the absence of the payment of compensation therefor, is not involved, and the cases cited by appellee which involve such an "unconstitutional taking" are distinguishable.[12]

In *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority* (Fla. 1959), 111 So. 2d 439, the Supreme Court of Florida found that there was no unlawful "taking" of property by enforcement of the height limitations of an airport zoning regulation, where its enforcement would not deprive the owner of the beneficial use of his

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12. See *Yara Engineering Corp. v. Newark* (1945), 132 N. J. L. 370, 40 A. 2d 559; *Ackerman v. Port of Seattle* (1960), 55 Wash. 2d 400, 348 P. 2d 684, 77 A. L. R. 1344; *Indiana Toll Road Comm. v. Jankovich* (1963), 244 Ind. 574, 193 N. E. 2d 237; *Roark v. Caldwell* (1964), 87 Idaho 557, 394 P. 2d 641; *Jackson Municipal Airport Authority v. Evans* (Miss. 1966), 191 So. 2d 126; and *Sneed v. Riverside* (1963), 218 Cal. App. 2d 205, 32 Cal. Rptr. 318.

land. In that case, there was no showing of any depreciation in value. See, also, *Waring v. Peterson* (Fla. 1962), 137 So. 2d 268.

Even if we were to assume a depreciation of the value of the Chongris' property such as to constitute a "taking" of property without the requisite payment of compensation, such would not necessarily result in an injunction against the enforcement of any airport zoning regulations as to their property as to permit the erection of structures without any regard to the safety of aircraft. Instead, under certain situations, a judicial solution to such problem would result in legal compulsion directed to the proper appropriating authority to compensate the landowner for such "taking."

In *State, ex rel. Royal v. Columbus, supra* (3 Ohio St. 2d 154), we did not enjoin "taking"; we there ordered proceedings for appropriation. *Causby, Griggs* and *Ackerman* involved payment for the "taking"; not injunction to prevent the taking.[13]

We turn now to the contention of the original plaintiff, the village (now city) of Willoughby Hills. Although the Court of Appeals made no ruling thereon, the municipal corporation asserts that the trial judge erred in failing to hold that the "home rule" power under Section 3, Article XVIII of the Ohio Constitution, to "zone" gives it the "exclusive" right to "zone" within its territory; that, therefore, R. C. 4563.03 is unconstitutional to the extent that it purports to confer "zoning" authority on others. That section of the Constitution provides that: "Municipalities shall have authority to exercise all powers of local

13. In some states compensation is determined in such cases without formal action to appropriate by a procedure referred to as "inverse condemnation." See, *e. g., Sneed v. County of Riverside, supra* (footnote 12); *Peacock v. Sacramento* (1969), 271 Cal. App. 2d 845, 77 Cal. Rptr. 391.

self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The Constitution does not preclude state action on matters of state concern, and we agree with the holding of the trial court that the safety and welfare of persons above and on the ground in the vicinity of modern day airports is a matter of state concern. Moreover, from an evidentiary standpoint, there was no showing that any of the airport zoning regulations in question would have the effect of nullifying any of the zoning ordinances of Willoughby Hills.

For the reasons heretofore stated, the judgment of the Court of Appeals is reversed.

Judgment reversed.

O'NEILL, *C. J.*, SCHNEIDER, HERBERT, HOLMES, CORRIGAN and STERN, *J.J.*, concur:

HOLMES, *J.*, of the Tenth Appellate District, sitting for DUNCAN, *J.* JUDGE HOLMES of the Court of Appeals was, pursuant to Section 2 of Article IV of the Constitution of Ohio, duly directed by the Chief Justice "to sit with the justices of the Supreme Court in the place and stead of" JUSTICE DUNCAN and JUDGE HOLMES did so and heard and considered this cause prior to the resignation of JUSTICE DUNCAN on November 28, 1971.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed November 18, 1970)

Case No. 4-81

IN THE COURT OF APPEALS

Eleventh Appellate District,

Lake County, Ohio

VILLAGE OF WILLOUGHBY HILLS, *et al.*,

Plaintiffs-Appellants,

VS.

HUGH A. CORRIGAN, *et al.*,

Defendants-Appellees.

This cause came on to be heard on the appeal on questions of law from the decision of the Court of Common Pleas of Lake County, Ohio, in Case No. 49,495, the bill of exceptions, the assignment of errors, briefs of the parties, briefs of amici curiae, and oral argument of counsel of both parties.

Upon due consideration, the Court finds that a clear justiciable controversy exists between Appellants and Appellees based upon legal rights and obligations of the parties as to matters pleaded in the amended petition of the within action in the Common Pleas Court for Lake County, Ohio.

The Court also finds that the owners of property located in the "Airport Hazard Area" in the airspace directly above their property through which airplanes approach and leave the Cuyahoga County Airport, own at least as much space above their property as they can occupy and use.

The Court further finds that Section 4563.03 of the Revised Code of Ohio, which creates the power of an Airport Zoning Board to regulate and restrict land uses and the height of structures and natural growth, constitutes a taking of property interest without due process of law and the Cuyahoga County Airport Zoning Regulations issued pursuant thereto, are unconstitutional, being a violation of the due process clauses of the Constitutions of the United States and Ohio.

The Court further finds that the Cuyahoga County Airport Zoning Regulations enacted under the authority of Section 4563.03 of the Revised Code of Ohio, are not zoning regulations under the exercise of police power, but constitute the taking of private property without compensation and as such are unreasonable, unconstitutional, confiscatory and void.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that Section 4563.03 of the Revised Code of Ohio, is unconstitutional and that the Cuyahoga County Airport Zoning Regulations enacted pursuant to the authority of Section 4563.03, Revised Code, pertaining to the area within the Village of Willoughby Hills which is designated by the Cuyahoga County Airport Zoning Board as an "Airport Hazard Area" are unreasonable, unconstitutional, confiscatory and void. Accordingly the judgment of the Common Pleas Court is reversed and final judgment is entered for the Appellants.

IT IS FURTHER ORDERED that the Appellees pay the costs of the within action.

To all of which Appellees except.

IT IS ORDERED that a special mandate issue out of this Court directing the Court of Common Pleas of Lake County, Ohio, to carry this judgment into execution.

S/ EDWIN T. HOFSTETTER
Presiding Judge
S/ ROBERT E. COOK
Judge
S/ GEORGE M. JONES
Judge

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Dated October 1, 1970)

Case No. 4-81
IN THE COURT OF APPEALS
Eleventh Appellate District,
Lake County, Ohio

VILLAGE OF WILLOUGHBY HILLS, *et al.*,
Plaintiffs-Appellants,

VS.

HUGH A. CORRIGAN, *et al.*,
Defendants-Appellees.

COOK, *J.*

This is an action instituted in the Common Pleas Court of Lake County for a declaratory judgment by the Village of Willoughby Hills and certain owners of real estate in Willoughby Hills, seeking a declaration that the statutes contained in Chapter 4563 of the Revised Code of Ohio are unconstitutional. The action also seeks a perma-

nent injunction enjoining the enforcement of any regulations issued pursuant to R.C. 4560.03.

The Common Pleas Court held that R.C. 4563.03 is constitutional and refused to enjoin the enforcement of any regulations issued pursuant to it. This appeal is from that judgment.

The pertinent facts are not in dispute.

The Cuyahoga County Airport is located in the cities of Richmond Heights and Highland Heights in Cuyahoga County, and a portion of its territory lies within the Village of Willoughby Hills in Lake County which adjoins Cuyahoga County.

On or about April 13, 1963, the Board of County Commissioners of Cuyahoga County and Lake County, pursuant to the authority of Chapter 4563 of the Ohio Revised Code, formed an Airport Zoning Board, which upon the recommendation of the Airport Zoning Commission, enacted zoning regulations which defined certain approved zones as "Airport Hazard Areas", areas over which airplanes leaving or approaching the Cuyahoga County Airport maneuver in the process of take-offs and landings, and said regulations imposed certain restrictions on real property located within said "Airport Hazard Area" pertaining to the height of objects of natural growth, the height of structures, and such lighting as may impair visibility in the vicinity of the Cuyahoga County Airport.

A certain area within the territory of the Village of Willoughby Hills, including lands belonging to plaintiffs-appellants, James and Bessie Chongris, was included in a zone of the "Airport Hazard Area" and was subject to said regulations.

Said area within the Village of Willoughby Hills which was included in a zoning of the "Airport Hazard Area" has also been zoned by said Village as "Single Family Residential."

The plaintiffs-appellants, hereinafter called appellants, set forth two assignments of error. First, they claim the Trial Judge committed prejudiced error in sustaining the motion of the defendants-appellees, hereinafter called the appellees, for an order to make the original petition definite and certain as to damages. Second, they claim the Trial Court erred in its judgment which is contrary to law and against the manifest weight of the evidence.

As to the first assignment of error, this Court is of the opinion that no prejudicial error was committed by the Trial Court since the amended petition filed by appellant clearly set forth an actual controversy between the parties, presenting a justiciable dispute which is the basis for an action seeking a declaratory judgment. (*Moskowitz v. Federman*, 72 O.A. 149).

The controversy required to support an action for a declaratory judgment must be a controversy based upon legal rights and obligations. (*Superior Dairy, Inc. v. Stack County Milk Producers Asso.*, 89 O.A. 26).

In order to have a justiciable question, it must be shown that the plaintiff has a legal interest in the alleged controversy. (*Zepp v. Columbus*, 50 O.O. 47).

However, a controversy exists where there is a dispute between the parties as to their rights, even though at the time of the proceeding a present cause of action, aside from the Declaratory Judgment Act, does not exist since the declaratory judgment will settle the uncertainty and insecurity of the plaintiff with respect to his rights

and will be res judicata as to such rights. (*Otten v. Cincinnati*, 10 O.O. 276).

In our opinion, the allegations contained in the appellants' amended petition and the evidence offered in support thereof make out a clear controversy between the parties as to their respective legal rights and obligations and thereby create the controversy required to support this action for declaratory judgment.

As to the second assignment of error, this Court is of the opinion that the fundamental issue is whether R.C. 4563.03 of the Ohio Revised Code is a proper exercise of the police power, in the form of airport zoning, as contended by the appellee, or whether R.C. 4563.03 has the effect of taking private property, within the constitutional meaning of the United States and Ohio constitutions, without compensation to the owners thereof in violation of said constitutions, as contended by the appellants.

In determining the answer to this basic issue, this Court, like all other courts dealing with similar facts, must concern itself with two fundamental principles of the law with reference to private property. One of the principles involved in this action is the ownership of private property and the right to the free use and enjoyment thereof. The other basic principle is the authority of the government (always subject to constitutional safeguards) to regulate the use and utilization of private property for public welfare.

In applying these two principles of law, we must first determine what interest, if any, is owned by the owners of property located within the "Airport Hazard Area" in the air space directly above their property through which the airplanes approaching and leaving Cuyahoga County Airport must operate.

Obviously, the common law doctrine that he who owns the surface owns everything above and below cannot, consistent with the traditional policy of the courts to adapt the law to the economic and social needs of the times, be relied upon to define rights with respect to the navigation of aircraft since a strict compliance with this doctrine would render all who fly aircraft over the land of another guilty of trespass.

Accordingly, the courts have held that the flying of aircraft over another's land is not a trespass unless the flight is conducted in such a manner or at such an altitude as to unreasonably interfere with the landowner's right of use and enjoyment of the surface. (*Swetland v. Curtiss Airport Corp.*, 41 Fed. 2d 929).

The common law doctrine of ownership of all above and below one's property has thus been limited. The rule now deducible from the authorities, suggesting a limitation upon the general application of the maxim, is that the justiciable right to the exclusive possession of land extends upwards only to that point necessary for the full use and enjoyment of the land and the incidents of its ownership, the balance being regarded as open and navigable airspace. (90 Law. Ed. 1218).

The Supreme Court of the United States, in *U. S. v. Causby*, 328 U.S. 256, held in Syllabus 6:

> "A landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land, even though he does not occupy it in a physical sense by buildings and the like."

In explaining its holding, the Supreme Court said:

> "We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control

of the immediate reaches of the enveloping atmosphere. Otherwise, buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are located on adjoining land. . . ."

It is argued that Congress had placed navigable airspace in the public domain, defining it, as of the time of the *Causby* decision, as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority: (44 Stat. 574) but that Congress redefined navigable airspace after the *Causby* decision to mean "airspace above the altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft." (72 Stat. 739).

But the Supreme Court of the United States reaffirmed its decision in the *Causby* case by holding, despite the C.A.A. change, in Syllabus 2 of *Griggs v. Allegheny County*, 369 U.S. 84:

"A landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."

Having established that a property owner owns at least as much space above his property as he can occupy and use, we now come to the fundamental question presented by the facts before us. Are the regulations promulgated under R. C. 4563.03 of the Revised Code of Ohio a legitimate exercise of the state's police power in the form of airport zoning or are they a taking of private property without compensation contrary to the due process clauses of the Fifth and Fourteenth Amendments of the United

States Constitution and Art. I, Sections 16 and 19 of the Ohio Constitution?

The pertinent part of R. C. 4563.03 reads as follows:

". . . Such legislative authority acting as the airport zoning board, may adopt, administer, and enforce airport zoning regulations for such airport hazard area. Airport zoning regulations may divide an airport hazard area into zones, and, within such zones, regulate and restrict land uses which by their nature constitute airport hazards, and regulate and restrict the height to which structures may be erected or objects of natural growth may be allowed to grow. . . ."

"An obstruction of airspace in an airport in an airport hazard area rising to a height not in excess of 40 feet above the established elevation of the airport, or 3 feet for each one hundred feet or fraction thereof its location is distant from the nearest point in the perimeter of the airport, whichever is greater shall be *prima facie reasonable.*" (Italics ours.)

The regulations promulgated by the joint Airport Zoning Board in this action, as set forth in appellants' Exhibit 2A. Rule 4, restrict the erection, replacement, construction, or altering of any structures and the growing of any objects of natural growth to such a height as to project into any of the created zones including in the Airport Hazard Area; prohibits public highways within 1000 feet of the end of runways or less than 15 feet below the plane of the approach zones; prohibits the use of any land located under any zone "in such a manner as to create electrical interference with radio communications between the airport and aircraft, make it difficult for flyers to distinguish between airport lights and other lights, result in glare in the eyes of flyers approaching, leaving or using

the airport, impair visibility in the vicinity of the airport or otherwise endanger the landing, taking off, or maneuvering of aircraft, or in any other manner constituting an airport hazard."

Rule 5 concerns the issuance of permits by the Airport Zoning Board. It says:

> "Within the airport hazard area, no excavations shall be commenced, no wall, structures, building or any part thereof shall be built, constructed or altered, nor shall any structure be moved or object of natural growth permitted until an application has been made to, and the proper permit has been obtained from the Cuyahoga County Airport Zoning Board or its duly authorized agents or representatives. The provisions of this section shall not apply to any obstruction or natural growth in an airport hazard area rising to a height not in excess of 40 feet above the natural grade elevation at the location of the structure or natural growth. The Cuyahoga County Airport Zoning Board may grant such permits upon such terms and conditions as it shall find to be just and reasonable, and with such modifications as it may prescribe."

Section 7.2 of the regulations requires the owner of any nonconforming structure or object of natural growth, permitted by Rule 7.1, to permit the installation, operation and maintenance thereon of markers and lights.

The appellees seek to justify R.C. 4563.03 and the regulations issued under its authority as a proper exercise of police power through zoning, arguing that the statutes were enacted and the regulations issued for the safety of persons and property of those who land and take off at the Cuyahoga County Airport and for the safety of the people who live in these zones.

The appellants, on the other hand, maintain Chapter 4563.03 and the regulations issued thereunder are not a proper exercise of police power, but, in reality, constitute a taking of property rights for which compensation should be paid and, therefore, R.C. 4563.03 and the rules issued thereunder violate the due process requirements of the United States and Ohio constitutions.

When private property rights are actually destroyed through the governmental act, then the police power rules are usually applicable. But when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable. See *Ackerman v. Port of Seattle*, 348 Pac. 2d 664.

That case quotes the language of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393:

> ". . . The protection of property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar decision is made upon the Fourteenth Amendment. . . ."
>
> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."
>
> ". . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . ."

The answer to the question as to whether R.C. 4563.03 of the Revised Code and the regulations issued under it is

a proper exercise of the police power by zoning or a taking without due process of law is found in the decisions of the United States Supreme Court and the Ohio Supreme Court.

The *Griggs v. Allegheny County* case, as well as the *Causby* case, held that the interference with the use of the owner's property by law over flights and noise amounted to a "taking" in the constitutional sense of an air easement, for which compensation must be made.

In the *Griggs* case the reasoning of the Court was expressed as follows:

> ". . . A county that designed and constructed a bridge would not have a useable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position as far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. . ."

It is obviously the purpose of R.C. 4563.03 to provide what amounts to an air easement for approaching and leaving aircraft by interfering with the enjoyment and use of the land laying below.

In *State v. Columbus*, 3 O.S. 2d 154, the Supreme Court of Ohio held:

> "There exists a taking in a constitutional sense of private property for public use under Section 19, Article I of the Ohio Constitution whenever air flights are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

It is the finding of this Court that Section 4563.03 of the Revised Code of Ohio which creates the power of an Airport Zoning Board to regulate and restrict land uses

and the height of structures and natural growth constitutes a taking of a property interest without due process of law, and the statute creating these powers and the regulations issued pursuant thereto are unconstitutional, being a violation of the due process clauses of the constitutions of the United States and Ohio.

This Court is in complete agreement with the decision in *Hageman v. Board of Trustees,* 20 O.A. 2d 12, which held that airport zoning regulations issued under the authority of R.C. 4563.03 by the Wright Patterson Airforce Base Zoning Board were not the zoning regulations under the exercise of police power but constitute the taking of private property without compensation and as such were unreasonable, unconstitutional, confiscatory and void. The only difference between our decision and the decision of the *Hageman* case is that we, as prayed for, find the statutes or R.C. 4563.03 as well as the regulations issued thereunder unconstitutional.

The logic of such a conclusion is buttressed by the finding that these statutes and regulations supposedly attempt to protect both the people in the hazard area and their property and those who use the facilities in the Cuyahoga County Airport and their property, but the owners of the land located in the hazard area are required to bear the cost of insuring the safety of the latter. This lack of mutuality emphasizes the unfairness of the theory that such statutes and regulations are a proper exercise of police power of zoning.

Judgment is reversed and final judgment is entered for the appellants.

JUDGE ROBERT E. COOK

HOFSTETTER, *P.J., Concurs.*
JONES, *J., Concurs.*

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

(Filed February 4, 1970)

Case No. 49,495
IN THE COURT OF COMMON PLEAS
State of Ohio, Lake County, ss.

VILLAGE OF WILLOUGHBY HILLS,
Plaintiff,

vs.

HUGH CORRIGAN, *et al.*,
Defendants.

This cause came on to be heard upon the pleadings, the evidence submitted during the trial, arguments and briefs of counsel of all of the parties to this action.

Upon due consideration of the foregoing, the Court finds that Chapter 4563 of the Revised Code of Ohio is a constitutional exercise of state legislative authority and does not violate the Ohio, or the United States Constitution.

The Court further finds that Chapter 4563 of the Revised Code of Ohio and the Cuyahoga County Airport Zoning Regulations enacted pursuant thereto, provide for regulations for the operation of public airports and for the safety and welfare of persons, both above and on the ground, and are, therefore, legitimate matters for state legislation and regulations adopted pursuant thereto.

The Court further finds that the Cuyahoga County Airport Zoning Regulations impose reasonable restrictions on the private land, and complement without nullifying the Village of Willoughby Hills Municipal Zoning Regulations

operating within the perimeter of the Airport Hazard Area, and are constitutionally enacted and in compliance with the statutes of Ohio.

The Court further finds that there is no evidence of interference with the right of the Village of Willoughby Hills under Article XVIII, 3, Ohio Constitution, to control development of the lands and to adopt zoning regulations within its jurisdiction.

The Court further finds that there is no evidence to support the contention of the plaintiffs Chongris that their property has suffered an impairment of use or a diminution in value by reason of the enactment and enforcement of the Cuyahoga County Airport Zoning Regulations.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the amended petition of the plaintiffs herein be, and the same is hereby dismissed, that all objections as to which the Court previously reserved ruling are hereby overruled, that the plaintiffs are hereby granted exceptions to all of the foregoing, that judgment is hereby granted to the defendants and all costs are hereby assessed against the plaintiffs.

OPINION OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

(December 18, 1969)

Case No. 49,495
IN THE COURT OF COMMON PLEAS
State of Ohio, Lake County, ss.

VILLAGE OF WILLOUGHBY HILLS,
Plaintiff,

vs.

HUGH CORRIGAN, *et al.*,
Defendants.

This decision is based upon evidence submitted during trial September 11, 1969, briefs subsequently received from all the parties and the court's own research of the law. The principal authorities cited by counsel were read and considered.

The public and private plaintiffs both seek a declaration that portions of Chapter 4563, Ohio Revised Code, authorizing Defendant Cuyahoga County Airport Zoning Board and conferring power upon it, as well as zoning regulations adopted by it, are constitutionally invalid. They make three contentions in asking that this declaration issue.

1) Because the statutes and the regulations are unrelated to public welfare and safety, but relate only to aircraft safety.

2) Because they conflict with the zoning power of the municipality under "Home Rule," Article XVIII, 3, Ohio Constitution, and interfere with municipal development.

3) Because they depress surrounding land values, and specifically Plaintiffs Chongris' land and effect a "taking" without compensation.

Neither these statutes nor zoning regulations adopted under their authority anywhere in Ohio may be deemed unconstitutional upon abstract complaints or hypothetical facts. Obviously the State must legislate to provide for public airports and to regulate their operation. The very nature of the subject requires that it be divorced from purely municipal controls, because it transcends municipal boundaries. The safety of aircraft in the air is intertwined with the safety of persons on the ground. To imply that a falling plane endangers only the pilot is to say that an automobile out of control threatens only the driver. As traffic laws are designed for the safety and welfare of persons off and on the highway, so airport zoning regulations are adopted for the safety and welfare of persons above and on the ground.

If the subject matter is legitimate for State legislation, such legislation as emerges is constitutional unless it substantially infringes upon some right constitutionally endowed upon another. *State* v. *Sherman,* 104 O.S. 307.

Plaintiffs' first contention is without merit. Their second and third contentions require closer study because they involve claims that injury to plaintiffs' constitutionally-protected rights has occurred.

Plaintiffs raise legitimate objections to the content and application of defendant's zoning regulations. But when considered in the light of the evidence introduced, they are abstractions, suspended in midair and unsupported by facts showing an existing or imminent injury.

The questions growing out of the objections are surely provocative enough to philosophize on such a level. Can

a public airport authority interfere with the interest of a municipality to develop as it pleases outside the confines of the airport itself? Can an airport authority effect a "taking" of a private interest in land by other than overflights which interfere with its use and enjoyment? By depressing its market value because of use and height restrictions?

But absent evidence of a real and substantial interference with municipal development, or a real and significant depression in land value, the questions can neither be entertained nor answered by any court.

The evidence here is woefully deficient on both counts. There is no showing that village development has been hampered, except insofar as it has chosen not to consider zoning changes within the airport "approach" and "transitional" zones. Not a single application for an airport zoning permit within its territory has been refused in six years. But one application has been received in all that time (Bishop Park Estates) and that one granted.

As for Plaintiffs Chongris, the opinion of their expert regarding a land value impairment was extremely speculative. Even so, I choose to admit it into evidence. Yet is it too nebulous to carry any weight. No dollar value was assigned to it. It is a $10 impairment, $100 or $1,000? Their present use and enjoyment of the land is in no way affected by either airport operations or zoning. They do not complain of overflights. Some trees exceed the height limitation, but they are exempt as non-conforming growths and no one has threatened to top them.

Plaintiffs say they want to install a TV tower and believe they cannot do so because of height restrictions. But they have not applied for a permit. And if they do apply,

one must be granted, for there is 70 feet of airspace available for it.

They claim that airport zoning height and runway restrictions prevent a future development of their back land for multi-family residential use. This claim, too, is speculative in the extreme. It is subject to these five prior conditions, none of which is at all certain to occur:

1) Land must be rezoned by the Village for such use.

2) There must first be an aggregation of land presently owned by different individuals.

3) A zoning application, when made, must be rejected by the airport zoning board because of a violation of height restrictions. The back land is in the "transitional" not "approach" zone and the minimum height allowance cannot be determined until the proposed building site is selected. Then, whether the allowance is exceeded cannot be known until the building height has been fixed.

4) Any proposed road must be found to be within 1,000 feet of the end of a runway before it can be prohibited by the regulation terms. And this must be interpreted to mean distance in any direction, rather than distance solely in a straight line from the runway end. Plaintiff's land is oblique from the line of the nearest runway.

5) Even if a zoning application was rejected and a roadway prohibited, an application for variances for both must be denied. Variances are provided for in Paragraph 8.3 of the zoning regulations in cases of "Unnecessary Hardship."

The complaints of both sets of plaintiffs may be good some day and some court, perhaps this one, may honor

them. But it must await a day when one or the other of them is subject to a real, not fancied injury, as was true in the recent case of *Hageman v. Board of Trustees,* 20 O.A. 2d 12. The constitutional principle that runs as a thread through plaintiffs' cited cases, "No public consfication of private interest without just compensation" is not renounced by this court. It simply cannot be applied here.

I hold that Chapter 4563, Ohio Revised Code, is a constitutional exercise of State Legislative authority; further that these airport zoning regulations are constitutionally enacted in compliance with the statutes, because they impose reasonable restrictions on the use of private land, in general, within the perimeter of the Airport Hazard Area, for a special use in the public interest. The regulations complement without nullifying the municipal zoning regulations operating in the same area.

The regulations may, however, be unconstitutional in the specific case of a landowner who has suffered, or is imminently threatened with, a significant interference with his right to use and enjoy his land, because of their attempted enforcement. In such a case, the attempt must fail and the airport authority would be compelled to pay the price of its interference or end it.

But this is not such a case. No actual or threatened interference of any kind is posed here.

All contentions of plaintiffs are rejected. Counsel for defendant shall prepare a journal entry summarizing these findings and submit it to opposing counsel and the court for approval. It shall assess costs to plaintiffs and give them exceptions. It shall also overrule all objections made during the trial, as to which rulings were reserved.

S/ ROBERT SIMMONS, *Judge.*

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO, OVERRULING DEMURRER

(July 15, 1969)

Case No. 49,495

IN THE COURT OF COMMON PLEAS

State of Ohio, Lake County, ss.

VILLAGE OF WILLOUGHBY HILLS,

Plaintiff,

vs.

HUGH CORRIGAN, *et al.*,

Defendants.

Defendants have demurred to the amended petition claiming, (1) misjoinder of plaintiffs, (2) no cause of action stated.

After considering the demurrer, briefs for and counter, the amended petition and the law, it is overruled. Exceptions to defendants. Plaintiffs are ordered to comply with Section 2721.12, Revised Code, by sending a copy of their amended petition to the Ohio Attorney General and filing a proof of service with the court.

IT IS SO ORDERED.

Defendants' first claim is refuted by Sections 2307.18 and 2721.12, Revised Code.

The former section permits this joinder and the latter requires it.

The second claim is also without merit. In their briefs, both sides expend considerable energy arguing for

the eventual result they favor. That is decidedly premature.

In a declaratory judgment action seeking a determination of legal rights and relationships arising from public enactments a demurrer is an inappropriate vehicle to obtain the preferred determination of questions raised in the petition. This is better left to the final hearing.

It is sufficient to state a cause of action under the Declaratory Judgments Act, even though the petition may be insufficient when cooercive remedies are sought. 16 O.J. 2d, *Declaratory Judgment,* Section 36, Page 670, e.s. This petition is sufficient under that test. While coercion is sought in the second cause, it is a derivative, not original remedy.

S/ ROBERT SIMMONS, *Judge.*

APPENDIX B

CONSTITUTIONS, STATUTES, ZONING REGULATIONS

CONSTITUTION OF THE UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO

Article I, Section 1:

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Article I, Section 16:

All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

(Suit against the state.) Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article I, Section 19:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its imme-

diate seizure or for the purpose of making or repairing road, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article XVIII, Section 3:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

OHIO REVISED CODE, CHAPTER 4563

AIRPORTS

(Safety of persons near airports; airport zoning)

§ 4563.01. Definitions.

As used in sections 4563.01 to 4563.21, inclusive, of the Revised Code:

(A) "Airport" means any area of land designed and set aside for the landing and taking off of aircraft, and for that purpose possessing one or more hard surfaced runways of a length of not less than three thousand five hundred feet, and designed for the storing, repair, and operation of aircraft, and utilized or to be utilized in the interest of the public for such purposes, and any area of land designed for such purposes for which designs, plans, and specifications conforming to the above requirements have been approved by the division of aviation and for

which not less than seventy percent of the area shown by such designs and plans to constitute the total area has been acquired. An airport is "publicly owned" if the portion thereof used for the landing and taking off of aircraft is owned, operated, leased to, or leased by the United States, any agency or department thereof, this state or any other state, or any political subdivision of this state or any other state, or any other governmental body, public agency, or public corporation, or any combination thereof.

(B) "Airport hazard" means any structure or object of natural growth or use of land within an airport hazard area which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or is otherwise hazardous of such landing or taking off of aircraft.

(C) "Airport hazard area" means any area of land adjacent to an airport which has been declared to be an "airport hazard area" by the division of aviation in connection with any airport approach plan recommended by such division.

(D) "Political subdivision" means any municipal corporation, township, or county.

(E) "Person" means any individual, firm, copartnership, corporation, company, association, joint stock association, or body politic and includes any trustee, receiver, assignee, or other similar representative thereof.

(F) "Structure" means any erected object, including but without limitation to buildings, towers, smokestacks, and overhead transmission lines.

§ 4563.02. Airport hazard a public nuisance.

The creation or establishment of an airport hazard shall be a public nuisance.

§ 4563.03. Airport zoning boards.

(A) When an airport is publicly owned and all airport hazard areas appertaining to such airport are located inside the territorial limits of one political subdivision, the legislative authority of the political subdivision shall constitute the airport zoning board. Such legislative authority, acting as the airport zoning board, may adopt, administer, and enforce airport zoning regulations for such airport hazard area. Airport zoning regulations may divide an airport hazard area into zones, and, within such zones, regulate and restrict land uses which by their nature constitute airport hazards, and regulate and restrict the height to which structures may be erected or objects of natural growth may be allowed to grow. An obstruction of air space in an airport hazard area rising to a height not in excess of forty feet above the established elevation of the airport, or three feet for each one hundred feet or fraction thereof its location is distant from the nearest point in the perimeter of the airport, whichever is greater, shall be prima facie reasonable.

(B) When an airport is publicly owned and any airport hazard area appertaining to such airport is located in more than one political subdivision, the board of county commissioners of each county in which such airport or such airport hazard area may exist, shall constitute the airport zoning board, which shall have the same power to adopt, administer, and enforce airport zoning regulations as provided in division (A) of this section. The board shall elect its own chairman.

§ 4563.04. Conflict of zoning regulations.

In the event of conflict between any airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, and any other zoning regulations applicable to the same area, whether the conflict be with respect to the height of structures or objects of natural growth, the use of land, or any other matter, and whether such other regulations were adopted by the political subdivision which adopted the airport zoning regulations or by some other political subdivision, the limitation or requirement best calculated to insure safety shall govern.

§ 4563.05. Appointment of airport zoning commission; public hearings.

Prior to initial zoning of any airport hazard area under sections 4563.01 to 4563.21, inclusive, of the Revised Code, the airport zoning board which is to adopt the regulations shall appoint a commission, to be known as the airport zoning commission, to recommend the boundaries of the various zones to be established and the regulations to be adopted therefor. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and the airport zoning board shall not hold its public hearings or take other action until it has received the final report of such commission. Where a city planning commission, township zoning commission, or county rural zoning commission already exists, it may be appointed as the airport zoning commission.

§ 4563.06. Adoption of airport zoning regulations; procedure.

No airport zoning regulations shall be adopted, amended, or changed under sections 4563.01 to 4563.21,

inclusive, of the Revised Code, except by action of the legislative body of the political subdivision, after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least thirty days notice of the hearing shall be published in a newspaper of general circulation in the political subdivision in which the airport hazard area to be zoned is located.

§ 4563.07. Zoning regulations shall be reasonable.

All airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code shall be reasonable, and none shall impose any requirement or restriction which is not reasonably necessary to insure the safety of aircraft in landing and taking off and the safety of persons occupying or using the area and the security of property thereon. In determining what regulations are necessary, each political subdivision or airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the per cent of slope or grade customarily used in descent or ascent of the aircraft expected to use the airport with reference to their size, speed, and type, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put or is adaptable.

§ 4563.08. Airport hazard area.

In order to define and determine the airport hazard area in which airport zoning shall be applicable, the division of aviation, upon request of any airport zoning commission appointed pursuant to section 4563.05 of the Revised Code, shall formulate and adopt an airport approach plan for any airport within its jurisdiction. The division

of aviation may revise such plan when necessary. Each plan shall indicate the airport hazard area, the circumstances under which structures, objects of natural growth, public highways, and certain uses of land would be airport hazards, and the heights, limits of structures and objects of natural growth, and what other restrictions should be contained in the airport zoning regulations. In adopting or revising such plan, the division of aviation shall consider, among other things, the size, type, and speed of aircraft expected to use such airport, the character of the flying operations expected to be conducted at such airport, the traffic pattern and regulations affecting flying operations at such airport, the location of public highways, the nature of the terrain, the height of existing structures and objects of natural growth above the level of the airport, and the possibility of lowering or removing existing obstructions. The division of aviation may obtain and consider information from and the opinion of any agency of the federal government charged with the promotion, regulation, or control of civil aeronautics as to the approaches necessary to safe flying operation at such airport.

§ 4563.09. Zoning regulation not to interfere with continuance of nonconforming use; exceptions.

No airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, and section 4563.99 of the Revised Code, shall require the removal, lowering, or other change or alteration of any structure or object of natural growth not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in section 4563.14 of the Revised Code.

§ 4563.10. Zoning board or political subdivision not granted power to prohibit certain uses.

Nothing in sections 4563.01 to 4563.21, inclusive, of the Revised Code, shall confer any power on any political subdivision or airport zoning board to prohibit the use of any land for farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, of animal and poultry husbandry, except where such use shall create an airport hazard. The provisions of sections 4563.01 to 4563.21, inclusive, and section 4563.99 of the Revised Code shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures, now existing or constructed in the future, of any public utility or railroad.

§ 4563.11. Administration and enforcement of zoning regulations.

All airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, shall provide for the administration and enforcement of such regulations. The duties of any administrative agency designated pursuant to sections 4563.01 to 4563.21, inclusive, of the Revised Code, shall include that of issuing all permits under section 4563.12 of the Revised Code.

§ 4563.12. Permit to construct, alter, or establish structure or use.

Airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, may require that a permit be obtained before any new structure or use may be constructed or established and before any existing structure or use may be substantially changed or substantially altered in an airport hazard area. No per-

mit shall be granted that would allow the establishment or creation of an airport hazard, or permit a nonconforming structure to be made higher or a nonconforming object of natural growth to become higher or become a greater hazard to air navigation than it was when the applicable regulations were adopted or than it is when the application for a permit is made. If any nonconforming use is voluntarily discontinued for two years or more, any future use of the premises shall be in conformity with sections 4563.01 to 4563.21, inclusive, of the Revised Code.

§ 4563.13. Zoning boards of appeals.

All airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, shall provide for an airport zoning board of appeals. Where a zoning board of appeals already exists, it may be designated as the airport zoning board of appeals. The airport zoning board of appeals, except in those instances in which an existing zoning board of appeals is designated as the airport zoning board of appeals, shall consist of five members, each to be appointed for a term of three years by the authority adopting the regulations and subject to removal by the appointing authority for cause upon written charges and after public hearing. The first members of such board of appeals shall be so designated that two shall serve for one year, two shall serve for two years, and one shall serve for three years.

§ 4563.14. Powers of airport zoning board of appeals.

The [airport zoning] board of appeals shall have and exercise the following powers:

(A) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of the airport zoning

regulations, as provided in sections 4563.11 and 4563.12 of the Revised Code.

(B) To hear and allow, refuse, or allow with modifications or conditions, any variance from the terms of the airport zoning regulations which the board may be authorized to pass upon pursuant to such regulations.

(C) To hear and decide specific variances under section 4563.16 of the Revised Code.

§ 4563.15. Airport zoning board of appeals may change airport zoning regulations; hearings.

(A) An airport zoning board of appeals, by a majority vote of its members, may affirm, reverse, or modify any order, requirement, decision, or determination of the administrative agency created pursuant to section 4563.11 of the Revised Code.

(B) The airport zoning board of appeals shall adopt rules in accordance with the provisions of the ordinance or resolution by which it was created. Meetings of the board shall be held at the call of the chairman and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All hearings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

§ 4563.16. Application to airport zoning board of appeals for variance.

Any person desiring to erect any structure, or increase the height of any structure, or permit the increases in height of any object of natural growth, or otherwise use his property in any manner in conflict with airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, may apply to the airport zoning board of appeals for a variance from the zoning regulations in question. Such variance shall be allowed where a literal application or enforcement of the regulations would result in unnecessary hardship and the relief granted would not be contrary to the public interest or create conditions dangerous to the safety of aircraft using the airport, but would do substantial justice and would not be in conflict with factors set down for consideration in sections 4563.07 and 4563.08 of the Revised Code. The board of appeals may subject any variance to any reasonable conditions that they deem necessary.

§ 4563.17. Maintenance of markers and lights on airport hazards.

In granting any permit under section 4563.12 of the Revised Code by the administrative agency or under section 4563.16 of the Revised Code by the airport zoning board of appeals, such agency may so condition such permit, if they deem such action advisable and reasonable in the circumstances, to require the owner of the structure or object of natural growth in question to permit the political subdivision, owning the airport, at its own expense, to install, operate, and maintain thereon such markers and lights as may be necessary to indicate the presence of an airport hazard.

§ 4563.18. Appeals to airport zoning board of appeals.

(A) Any person aggrieved by any decision of an administrative agency made in its administration of airport zoning regulations adopted under sections 4563.01 to 4563.21, inclusive, of the Revised Code, or any governing body of a political subdivision or any airport zoning board which is of the opinion that a decision of such an administrative agency is an improper application of airport zoning regulations of concern to such governing body or board, may appeal to the airport zoning board of appeals authorized to hear and decide appeals from the decisions of such administrative agency.

(B) All appeals taken under this section shall be taken within twenty days after an order is filed in the office of the administrative agency, as provided by the rules of the airport zoning board of appeals, by filing with the administrative agency from which the appeal is taken and with the airport zoning board of appeals a notice of appeal specifying the grounds of such appeal. The administrative agency from which the appeal is taken shall transmit to the airport zoning board of appeals all the papers constituting the record upon which the action appealed from was taken.

(C) An appeal shall stay all proceedings in furtherance of the action appealed from unless the administrative agency from which the appeal is taken certifies to the airport zoning board of appeals, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such cases proceedings shall not be stayed other than by order of the airport zoning board of appeals on notice of the agency from which the appeal is taken and on due notice to the parties in interest.

(D) The airport zoning board of appeals shall fix a reasonable time for the hearing of appeals, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person, by agent, or by attorney.

(E) The airport zoning board of appeals, in conformity with sections 4563.01 to 4563.21, inclusive, of the Revised Code, may reverse, affirm wholly or partly, or modify, the order, requirement, decision, or determination appealed from.

§ 4563.19. Appeals to court of common pleas.

Any person aggrieved, or any taxpayer, or any legislative authority, or any airport zoning board affected by any order of the airport zoning board of appeals may appeal within 30 days to the court of common pleas of the county in which the affected real estate lies, and upon appeal thereof a trial de novo shall be had.

§ 4563.20. Prohibitions.

No person shall violate any regulation, order, or ruling promulgated or made pursuant to sections 4563.01 to 4563.21, inclusive of the Revised Code.

§ 4563.21. Court action to enforce regulations.

The political subdivision or airport zoning board adopting zoning regulations under sections 4563.01 to 4563.21, inclusive, of the Revised Code, may institute in any court of competent jurisdiction an action to prevent, restrain, correct, or abate any violation of sections 4563.01 to 4563.21, inclusive, of the Revised Code, or of airport zoning regulations adopted under such sections, or of any order or ruling made in connection with the administration or enforcement. The court shall adjudge to the plaintiff such relief,

by way of injunction, which may be mandatory, or otherwise, as may be proper under all the facts of and circumstances of the case, in order fully to effectuate the purposes of sections 4563.01 to 4563.21, inclusive, of the Revised Code, and of the regulations adopted and orders and rulings made pursuant thereto.

§ 4563.99. Penalties.

Whoever violates section 4563.20 of the Revised Code, shall be fined not more than one hundred dollars. Each day's willful continuation of such violation is a separate offense.

PLAINTIFF'S EXHIBIT 2-A

Cuyahoga County Airport Zoning Regulations

Regulations restricting the height of structures and objects of natural growth within the hazard area of the Cuyahoga County Airport; creating various zones; defining certain terms used; referring to the Cuyahoga County Airport Zoning Map which is made a part hereof; providing for enforcement and imposing penalties; and establishing a Cuyahoga County Airport Zoning Board of Appeals. Amended 8-26-65 included.

Adopted By The
Cuyahoga County Airport
Zoning Board
December 5, 1963

CUYAHOGA COUNTY AIRPORT ZONING REGULATIONS

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12.0 Effective Date

PREAMBLE

These regulations are adopted pursuant to the authority conferred by Sections 4563.01 through 4563.99 of the Revised Code of the State of Ohio. It is hereby found that the existence of an airport hazard would endanger the lives and property of users of the Cuyahoga County Airport and of occupants of land in its vicinity. An airport hazard would in effect reduce the size of the area available for the landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of

the Cuyahoga County Airport and the public investment therein.

Accordingly, it is declared:

(1) That the creation or establishment of an airport hazard shall be a public nuisance;

(2) That it is necessary, in the interest of the public health, public safety and general welfare, that the creation or establishment of airport hazards be prevented; and

(3) That the prevention of these hazards should be accomplished, to the extent legally possible, by the adoption of Airport Zoning Regulations.

It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which political subdivisions may raise and expend public funds and acquire land or interests in land.

CUYAHOGA COUNTY AIRPORT ZONING REGULATIONS

1.0 *Definitions*

The terms used in these Cuyahoga County Airport Zoning Regulations apply to the Cuyahoga County Airport located in the City of Richmond Heights, and the Village of Highland Heights, Cuyahoga County, and the Village of Willoughby Hills, Lake County, Ohio, and are defined below:

1.1 *Airport Hazard Area*

The airport hazard area for the Cuyahoga County Airport, as determined by the Ohio Division of Aviation, is the area wholly contained within a circle with its center on the airport reference point and a radius of 12,000 feet.

1.2 *Reference Point*

The Airport reference point is an established point having equal relationship to all landing or take-off areas of the airport, and is the geographical center of these areas.

1.3 *Height*

For the purpose of determining the height limits in all zones set forth in these regulations, the datum shall be mean sea level elevation unless otherwise specified.

1.4 *Airport Elevation*

Airport elevation means the elevation of the highest point on the usable landing area. The airport elevation for these regulations is established as 880 feet above mean sea level.

1.5 *Plane*

The word "plane" shall mean a surface, real or imaginary, in which if any two points are taken, the straight line that joins them lies wholly in that surface.

1.6 *Structure*

Structure means an object constructed or installed by man, including, but without limitation to, buildings, towers, smokestacks, steeples, antennas, and overhead transmission lines.

1.7 *Zones*

A zone is the airspace above a plane or conical surface described in Section 2 of these regulations. There are several types of zones, known as Approach Zones, Transitional Zones, Horizontal Zones and Conical Zones.

1.8 *Airport Hazard*

An airport hazard is any structure or object of natural growth located, or use of land, in the airport hazard area which projects into any of the zones herein described and obstructs the airspace required for, or is otherwise hazardous to, the flight of aircraft landing, taking-off or using the airport.

1.9 *Runways*

Runway means the paved or unpaved surface of an airport landing strip. The runways described herein are more particularly shown in detail on the map described in Section 3.0.

1.91 *Instrument Runways*

Instrument runway means a runway equipped or to be equipped with electronic or visual air navigation aids adequate to permit the landing of aircraft under restricted visibility conditions. There are presently no instrument runways at the Cuyahoga County Airport.

1.92 *Non-instrument Runways*

Non-instrument runways means a runway other than an instrument runway. There are two (2) non-instrument runways at Cuyahoga County Airport.

1.921 The established length of non-instrument runway 5-23 is 4,500 feet long running in a northeast-southwest direction, and intersects non-instrument runway 13-31. The elevation at the end of runway 5 (southwest end) is 873 feet above mean sea level and the elevation at the end of runway 23 (northeast end) is 869 feet above mean sea level.

1.922 Non-instrument runway 13-31 is 4,000 feet long running in a northwest-southeast direction and intersects non-instrument runway 5-23. The elevation at the end of runway 13 (northwest end) is 842 feet above mean sea level and the elevation at the end of runway 31 (southeast end) is 880 feet above mean sea level.

2.0 *Zones*

In order to carry out the provisions of these Cuyahoga County Airport Zoning Regulations, there are hereby created and established certain zones within the airport hazard area of Cuyahoga County and Lake County. The various zones are described as follows:

2.1 *Runway Landing Areas*

2.11 *Non-Instrument Runway Landing Areas*
The runway landing area for the 5-23 and 13-31 runways is a rectangular area symetrically about the runway center line with an overall width of 400 feet and with its length extending to a line 200 feet beyond each end of the runway which line is defined as the landing area end.

2.2 *Approach Zones*

2.21 *Non-Instrument Approach Zones*

The approach zone for each end of the 5-23 and 13-31 Non-Instrument Runways is the air space above a plane sloping upward and outward from the end of the runway landing area to its outer boundary at the uniform rate of 1 foot in elevation for each 40 feet measured horizontally along the extended centerline of said runway. This plane shall increase in width, at a uniform rate symmetrically about the extended runway centerline, from 400 feet at its beginning to 2,400 feet at its outer boundary which at 10,000 feet distant from the end of the runway landing area measured horizontally along the extended centerline of the runway, is 250 feet above the elevation at the end of the runway.

2.3 *Transitional Zones*

Transitional zones consist of the air space above planes which slope upward and outward laterally from the sides of the planes forming the base of the approach zones and from the sides of the runway landing areas. These planes shall be contiguous with the sides of the planes forming the base of the approach zones and, with the sides of the runway landing areas and extending upward and outwardly at the uniform rate of 1 foot in elevation for each 7 feet in horizontal distances. These planes extend upward and outward until they intersect with the planes forming, respectively, the bases of the Horizontal and Conical

Zones, which are described in the following paragraphs.

2.4 *Horizontal Zone*

The Horizontal Zone is the air space above a circular horizontal plane 150 feet above the airport elevation having a radius of 7,000 feet measured horizontally from the airport reference point.

2.5 *Conical Zone*

The Conical Zone is the air space above a conical surface extending upward and outward at a uniform rate of 1 foot in elevation for each 20 feet in horizontal distance starting at the circumference of a circle whose radius is 7,000 feet from the airport reference point and an elevation of 150 feet above airport elevation (this being the outer boundary of the plane forming the base of the Horizontal Zone) and terminating at a radius of 12,000 feet from the airport reference point and at an elevation of 400 feet above the airport elevation.

3.0 *Map*

Made a part hereof is a map entitled the Cuyahoga County Airport Zoning Map consisting of one sheet showing the Cuyahoga County Airport, airport reference point, elevation, runways, zones, and heights set forth herein. The designations of zones, and heights set forth on such map are made a part hereof and incorporated herein by reference. A copy of the map shall be displayed and maintained in the administration offices of the Cuyahoga County Airport.

4.0 *Restrictions*

4.1 *Height Restrictions*

Except as otherwise provided in these regulations, no structures shall be erected, replaced, constructed, or altered, nor shall objects of natural growth be permitted to grow to such a height as to project into any of the respective zones described above. Where an area is covered by more than one height restriction, the more restrictive limitation shall prevail.

4.2 *Public Highways*

No public highways shall be located within 1,000 feet of the end of the runway or less than 15 feet below the plane of the approach zones.

4.3 *Use Restrictions*

Notwithstanding any other provisions in these regulations, no use may be made of land under any zone established by these regulations in such a manner as to create electrical interference with radio communication between the airport and aircraft, make it difficult for flyers to distinguish between airport lights and other lights, result in glare in the eyes of flyers approaching, leaving or using the airport, impair visibility in the vicinity of the airport or otherwise endanger the landing, taking-off, or maneuvering of aircraft, or in any other manner constituting an airport hazard.

5.0 *Permits*

Within the airport hazard area, no excavation shall be commenced; no wall, structures, building or any part thereof shall be built, constructed or altered, nor shall any

structure be moved or object of natural growth permitted until an application has been made to, and the proper permit has been obtained from the Cuyahoga County Airport Zoning Board or its duly authorized agent or representatives. The provisions of this section shall not apply to any obstruction or natural growth in an airport hazard area rising to a height not in excess of 40 feet above the natural grade elevation at the location of the structure or natural growth. The Cuyahoga County Airport Zoning Board may grant such permits upon such terms and conditions as it shall find to be just and reasonable, and with such modifications as it may prescribe. (Amended 8-26-65.)

5.1 *Applications*

All applications shall be submitted in triplicate accompanied by accurate plans showing the height above ground, the height above mean sea level and the location of the proposed structure as well as such other information as may be necessary to determine and provide for the enforcement of these regulations. Application forms for permits shall be provided by the Cuyahoga County Airport Zoning Board.

5.2 *Application Fee*

All applications for permits shall be accompanied by a fee of $2.00 to be paid to the Cuyahoga County Airport Zoning Board or the duly authorized agent or representative of the Board issuing such permit.

5.3 *Permits Not Granted*

No permit shall be granted that would allow the establishment or creation of an airport hazard, or permit a nonconforming structure to be made

higher, or a nonconforming object of natural growth to become a hazard to air navigation in violation of these regulations or applicable State statutes.

5.4 *Violation of Regulations*

It shall constitute a violation of these regulations for any person, firm, or corporation, either owner or agent, to do any of the things mentioned in the first paragraph of this section (Section 5.0) without having first obtained the said permit; and any permit issued upon a false statement of any fact which is material to the issuance thereof shall be void. Any person who shall proceed thereafter with the work for which the permit was issued without having obtained a new permit in accordance with this regulation shall be deemed guilty of violation thereof.

6.0 *Penalties*

Any person who violates any of the provisions of these regulations shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than $10.00 nor more than $100.00 and each day upon which said violation shall continue shall constitute a separate offense.

7.0 *Nonconforming Uses*

7.1 *Regulations Not Retroactive*

These regulations shall not apply to existing structures or objects of natural growth so as to require the removal, lowering, or other changes or alteration of any such structure or object of natural growth. However, no nonconforming structure shall be made higher nor shall any

nonconforming object of natural growth be allowed to become higher or become a greater hazard than it is at the time these regulations are adopted. If any nonconforming use is discontinued for two years or more, any future use of the premises shall be in conformity with the provisions of these regulations. Any nonconforming structure or object of natural growth which is hereafter damaged by any means to an extent exceeding 50% of its then reproduction value may not be restored or reconstructed to a height greater than permitted under the provisions of these regulations.

7.2 *Marking and Lighting*

Notwithstanding the preceding provision, the owner of any nonconforming structure or object of natural growth is hereby required to permit the installation, operation and maintenance thereon of such markers and lights as shall be deemed necessary by the Federal Aviation Agency to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport hazards. Such markers and lights shall be installed, operated and maintained at the expense of Cuyahoga County.

8.0 *Cuyahoga County Airport Zoning Board of Appeals*

There is hereby created pursuant to Section 4563.13 of the Revised Code the Cuyahoga County Airport Zoning Board of Appeals (hereinafter called Board of Appeals). The Board of Appeals shall consist of five members appointed by the Cuyahoga County Airport Zoning Board. The members of the Board of Appeals shall each

be appointed for a term of three years except that the first members of such Board of Appeals shall consist of two members appointed to serve for a term of one year, two members to serve for a term of two years and one member for a term of three years. The membership of the Board of Appeals shall be subject to removal as provided in Section 4563.13 of the Revised Code.

8.1 *Powers*

The Board of Appeals shall have and exercise the following powers:

(A) To adopt rules governing the organization of the Board of Appeals, its proceedings and to regulate the mode and manner of conducting hearings. All hearings shall be public.

(B) To hear and decide appeals, filed pursuant to Section 4563.18 of the Revised Code, from any order, requirement, decision, or determination made by the Cuyahoga County Airport Zoning Board in the enforcement of the airport zoning regulations, as provided in Sections 4563.11 and 4563.12 of the Revised Code.

(C) To hear and allow, refuse, or allow with modifications or conditions, any variance from the terms of the airport zoning regulations which the Cuyahoga County Airport Zoning Board may be authorized to pass upon pursuant to such regulations.

(D) To hear and decide specific variances under Section 4563.16 of the Revised Code. The

Board of Appeals shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the Board of Appeals and shall be a public record.

8.2 *Actions*

The Board of Appeals, by a majority vote of its members, may affirm, reverse, or modify any order, requirement, decision, or determination of the Cuyahoga County Airport Zoning Board.

8.3 *Variances*

Any person desiring to erect any structure, or increase the height of any structure, or permit the increase in height of any object of natural growth, or otherwise use his property in any manner in conflict with airport zoning regulations adopted under Section 4563.01 to 4563.21, inclusive, of the Revised Code, may apply to the Board of Appeals for a variance from the zoning regulations in question. Such variance shall be allowed where a literal application or enforcement of the regulations would result in unnecessary hardship and the relief granted would not be contrary to the public interest or create conditions dangerous to the safety of aircraft using the airport, but would do substantial justice and would not be in conflict with factors set down for consideration in Section 4563.07 and 4563.08 of the Revised Code. The Board of Appeals may subject any variance to any reasonable conditions that they deem necessary.

9.0 *Judicial Review*

Any person grieved, or any taxpayer, or any legislative authority, or any airport zoning board affected by any order of the Cuyahoga County Airport Zoning Board of Appeals may appeal within Thirty (30) days to the Court of Common Pleas of the County in which the affected real estate lies, as provided for by Section 4563.19, Revised Code of Ohio.

10.0 *Changes to Regulations*

The Cuyahoga County Airport Zoning Board, by a majority vote of its members, may from time to time, on its own motion or on the written application of any affected taxpayer or political subdivision located within the airport hazard area, amend, change or supplement these regulations. But no such amendment or change shall be made except after public hearing at which parties in interest and citizens shall have an opportunity to be heard and after proper notice has been published all as provided in Section 4563.06 of the Revised Code.

10.1 *Conflicting Regulations*

Where there exists a conflict between any of the regulations or limitations prescribed in these zoning regulations and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees, the use of land, or any other matter, the more stringent limitation of the requirement shall govern and prevail.

11.0 *Constitutionality*

If any section or provision of these regulations or the application thereof to any person or circumstance be decided by the courts to be unconstitutional or in-

valid, such decision shall not affect the validity of these regulations as a whole, or any part thereof other than the part so held to be unconstitutional or invalid, and to this end the provisions of these regulations are declared to be severable.

12.0 *Effective Date*

These regulations shall be in full force and effect from and after the earliest period allowed by law following publication, posting and passage thereof by the Cuyahoga County Airport Zoning Board.

Adopted by the Cuyahoga County Airport Zoning Board this 5th day of December, 1963.

The Legal Form and Correctness of the within instrument is hereby Approved.

JOHN T. CORRIGAN, *Prosecuting Attorney*

By JOSEPH A. ZINGALES,
Assistant Prosecuting Attorney

ROGER SMART
FRANK M. GORMAN
WILLIAM P. DAY
J. WILLIAM STANTON

RESOLUTION

In the matter of adoption of Zoning Regulations for the Cuyahoga County Airport.

WHEREAS, pursuant to publication of hearing and in accordance with Revised Code Section 4563.06, this Cuyahoga County Airport Zoning Board (hereinafter referred to as Zoning Board) did hold its public hearing at the Cuyahoga County Airport, 355 Richmond Road, at which

parties in interest and citizens were given an opportunity to be heard on the question of adoption of Cuyahoga County proposed Airport Zoning Regulations, and

WHEREAS, as said public hearing no objections to the proposed Zoning Regulations were made, and

WHEREAS, this Zoning Board has considered, among other things, the character of the flying operations expected to be conducted at the Cuyahoga County Airport, the percent of slope or grade customarily used in descent or ascent of the aircraft expected to use the airport with reference to their size, speed, and type, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put or is adaptable, and find that the said airport regulations as proposed are reasonable and none impose any requirement or restriction which is not reasonably necessary to insure the safety of aircraft landing and taking off and the safety of persons occupying or using the area and the security of property thereon.

Now, THEREFORE, be it resolved by this Zoning Board that the proposed Zoning Regulations be, and they are hereby adopted as the Zoning Regulations for the Cuyahoga County Airport, a copy of which is attached hereto and made a part hereof as if fully rewritten herein.

BE IT FURTHER RESOLVED that copies of the said adopted Zoning Regulations shall be signed by the members of this Zoning Board, one to be retained by the Boards of County Commissioners of both Cuyahoga and Lake Counties and one to be retained by the Zoning Board as official and original records.

BE IT FURTHER RESOLVED, that William F. Chinnock, clerk of the Cuyahoga County Zoning Board, be, and he is hereby directed to transmit a certified copy of this

Resolution to C. Gordon Smith, Clerk of the Board of County Commissioners of Lake County to spread upon their Journal.

BE IT FURTHER RESOLVED that the said William F. Chinnock, be, and he is further directed to spread this Resolution upon the Journal of the Board of County Commissioners of Cuyahoga County.

Upon motion of Commissioner Day of Cuyahoga County, seconded by Commissioner Stanton of Lake County, the foregoing resolution was duly adopted.

Ayes: William P. Day—Cuyahoga County
Frank M. Gorman—Cuyahoga County
Roger Smart—Lake County
William Stanton—Lake County

Nayes: None.

Resolution adopted.

WILLIAM F. CHINNOCK, *Clerk,*
Cuyahoga County Airport Zoning Board.

Journal: 140 Page 398-A
December 5, 1963

PLAINTIFF'S EXHIBIT 23.

CUYAHOGA COUNTY AIRPORT ZONING MAP

HEIGHT REGULATIONS

ADOPTED BY
CUYAHOGA COUNTY AIRPORT ZONING BOARD
RESOLUTION NO. _____ DATE _____
CUYAHOGA COUNTY — LAKE COUNTY

RECOMMENDED BY
CUYAHOGA COUNTY AIRPORT ZONING COMMISSION
DATE 7-21-65

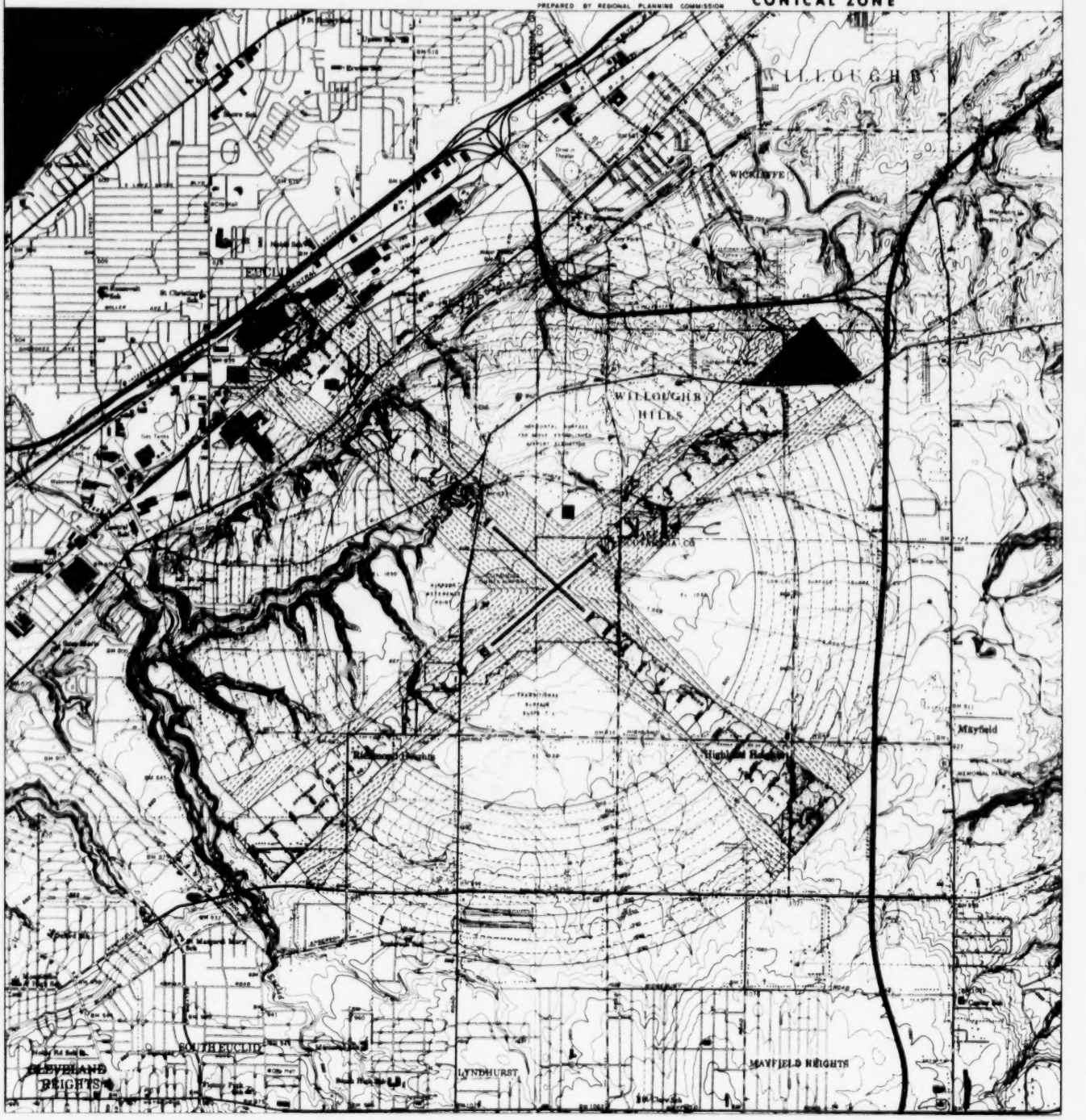
APPROVED BY

OHIO STATE DIVISION OF AVIATION
APPROVED DATE 9/20/65

Scale 1"=2000'

LANDING AREA
APPROACH ZONE
TRANSITIONAL ZONE
HORIZONTAL ZONE
CONICAL ZONE

PREPARED BY REGIONAL PLANNING COMMISSION



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JUN 23 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM

No. 71-1532

JAMES CHONGRIS, et al.,
Petitioners,

vs.

HUGH A. CORRIGAN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION.

JOHN T. CORRIGAN
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Cuyahoga County, Ohio

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2. Do Airport Zoning Regulations adopted by a County Airport Zoning Board pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, *per se*, violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when the facts of the case clearly establish that there has been no immediate or direct interference with the use and enjoyment by the owners of private property located in the area designated as "Airport Hazard Area"? 11

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In the Supreme Court of the United States

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BRIEF OF RESPONDENTS IN OPPOSITION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

In deciding the instant case, the Ohio Supreme Court reviewed the facts of the case. In the opinion of the Supreme Court of Ohio (see Appendix A-13) the Court states the following:

> "In the instant case, the 'invasion' of the 'superadjacent airspace' has not been shown to have affected either the present use or any reasonably foreseeable use of the land."

The laws and the Constitution of Ohio, provide a complete and adequate remedy for the compensation of owners of private property in case the enforcement of any of the airport zoning regulations would result in the taking of property. The Supreme Court of Ohio so held in Syllabus 2 of its opinion (see Appendix A-2) as follows:

> "2. When it is shown that the enforcement of any airport zoning regulation as to specific property will result in an unconstitutional 'taking' of such property, a court may enjoin the operation of the airport zoning regulation as to such property, or may, whichever is more appropriate under the circumstances, direct the institution of eminent domain proceedings for the purpose of compensating the property owner for such 'taking'."

The evidence supports the findings of the Supreme Court of Ohio, that there was no taking of private property for public use by the Airport Zoning Board of Cuyahoga County, Ohio, and that the Chongrises, petitioners herein, were not deprived of the use and enjoyment of their property whatsoever. (See Ohio Supreme Court Opinion, Appendix A-7.)

In the case of *Garner v. State of Louisiana*, La. 1961, 82 S. Ct. 248, 368 U.S. 157, 7 L. Ed. 2d. 207, the Supreme Court of the United States stated the following:

> "United States Supreme Court is bound by a state's interpretation of its own statute and will not substitute its judgment for that of the state's when it becomes necessary to analyze evidence for purpose of determining whether that evidence supports findings of state court."

Accordingly, we contend that in the instant case, this court is bound by the Supreme Court of Ohio in its interpretation of the Ohio statute and the evidence and may not substitute its judgment for that of the Ohio Supreme Court.

QUESTIONS PRESENTED

1. Does Chapter 4563 of the Revised Code of Ohio, *per se,* violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when sections of said Chapter 4563 authorize the creation of Airport Zoning Boards and empower said Airport Zoning Boards to adopt Airport Zoning Regulations imposing certain restrictions upon the height of structures and natural growth in an area designated as "Airport Hazard Area"?

2. Do Airport Zoning Regulations adopted by a County Airport Zoning Board pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, *per se,* violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when the facts of the case clearly establish that there has been no immediate or direct interference with the use and enjoyment by the owners of private property located in the area designated as "Airport Hazard Area"?

STATEMENT OF THE CASE

In November, 1968, the Village of Willoughby Hills (now City), a municipal corporation, filed an action in the Common Pleas Court of Lake County, Ohio, entitled "Petition for Declaratory Judgment, Injunction and other Equitable Relief." The Plaintiff Village alleged that Chapter 4563 of the Revised Code of Ohio, and the Airport Zoning Regulations adopted by the Cuyahoga County Airport Zoning Board pursuant to the authority of said Chapter, were in violation of Article XVIII, Section 3, of the Ohio Constitution. The question of violation of the Federal Constitution was not raised in the original petition of the Plaintiff Village. In the said original action, the Plaintiff Village further alleged that the Airport Zoning Regulations adopted by the Cuyahoga County Airport Zoning Board

were null and void because they purported to regulate the territory of the Plaintiff Village, and, that as a consequence, the said Village had been damaged and its constitutional rights to enact and enforce zoning regulations within its territorial limits had been infringed upon and would be infringed upon unless the defendants were restrained by a Court Order.

The defendants filed their joint motion to make the petition definite and certain and the trial court granted defendant's motion in part, granting also leave to the Plaintiff Village to amend its petition. Pursuant to the order of the Common Pleas Court of Lake County, the Village of Willoughby Hills, *the only Plaintiff in the original petition,* filed an amended petition and joined thereto as party plaintiffs, James A. Chongris, Bessie Chongris, Anton J. Oblak and Mildred F. Oblak, owners of real estate located within the territory of the said Village of Willoughby Hills.

In the amended petition, Plaintiff Village alleged that it had been damaged as it could not properly plan and zone portions of the area within its territory which had been defined as "Airport Hazard Area" and had been subject to the Zoning Regulations which had been adopted by the Cuyahoga County Airport Zoning Board. Plaintiff Village further alleged that the Zoning Regulations adopted by the Airport Zoning Board were causing the property values of real property within the area alleged to be subject to the jurisdiction of the defendants to be depressed, with a resulting loss of tax revenues of said Plaintiff Village. Plaintiffs James A. and Bessie Chongris and Anton J. and Mildred F. Oblak alleged that their respective properties suffered a diminution in value.

During trial, plaintiffs Anton J. and Mildred F. Oblak were voluntarily dismissed. The trial Court, considering the evidence adduced at the trial, found that there was no

evidence to support the contention of the plaintiffs Chongris that their property had suffered an impairment of use or a diminution in value by reason of the enactment and enforcement of the Cuyahoga County Airport Zoning Regulations. (See Appendix, A-34.) Furthermore, as to Plaintiff Village of Willoughby Hills, the trial Court found that there was no evidence of interference with the right of the Village of Willoughby Hills under Article XVIII, Section 3, Ohio Constitution, to control development of the land, and to adopt regulations within its jurisdiction. (See Appendix, A-34.)

The trial Court also held that "Chapter 4563, Ohio Revised Code, is a constitutional exercise of State Legislative authority; further that these airport zoning regulations are constitutionally enacted in compliance with the statutes, because they impose reasonable restrictions on the use of private land, in general, within the perimeter of the Airport Hazard Area, for special use in the public interest." The trial Court found that "the regulations complement without nullifying the municipal zoning regulations operating in the same area." (See Appendix A-36.)

The Court of Appeals, Eleventh Appellate District, Lake County, Ohio, reversed the Common Pleas Court and found, without any supporting evidence, that Section 4563.03 of the Revised Code of Ohio, which creates the power of an Airport Zoning Board to regulate and restrict land uses and the height of structures and natural growth, *per se*, constitutes a taking of a property interest without due process of law and the statute creating these powers and the regulations issued pursuant thereto to be unconstitutional, being in violation of the due process clauses of the Constitutions of the United States and Ohio. (See Appendix, A-28, 29.)

The Supreme Court of Ohio reversed the Court of Appeals of the Eleventh Appellate District and held that

the provisions of Ohio Revised Code, Chapter 4563, to the extent that they authorize the adoption and enforcement of airport zoning regulations within the territory of a municipal corporation, are not unconstitutional and that "Airport Zoning regulations, adopted in accordance with the provisions of R.C. Chapter 4563 and designed to reduce 'airport hazards' may constitutionally be adopted as an exercise of the 'police power' of the State of Ohio, if such regulations are reasonably necessary to insure the safety of aircraft in landing and taking off and the safety of persons occupying or using the area and the security of property thereon." (The Opinion of the Supreme Court of Ohio, filed on February 2, 1972 and reported at 29 Ohio St. 2d. 39. (Appendix A-1 thru A-16.)

THE FACTS

Cuyahoga County of the State of Ohio owns and operates an airport which is located in the City of Richmond Heights and the Village of Highland Heights located in Cuyahoga County, Ohio, and within a portion of the Village of Willoughby Hills (now City of Willoughby Hills), located in Lake County, Ohio.

On or about April 13, 1963, the Board of County Commissioners of Cuyahoga County, Ohio and the Board of County Commissioners of Lake County, Ohio, formed, pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, an Airport Zoning Board entitled "Cuyahoga County Airport Zoning Board." This Board appointed, as authorized by Chapter 4563 of the Revised Code of Ohio, an Airport Zoning Commission for the purpose of recommending the boundaries of the various zones to be established and the regulations to be adopted therefor. The Zoning Commission, pursuant to its appointment, made its study and held public hearings before its final recom-

mendation of the Airport Zoning Regulations to the Airport Zoning Board, which adopted the same on or about December 5, 1963 (Appendix, A-70). The Airport Zoning Regulations adopted defined certain area in the vicinity of the airport as "Airport Hazard Area" (Appendix, A-56) and imposed certain restrictions pertaining to the height of structures and of natural growth located within the area designed as "Airport Hazard Area" (Appendix, A-61).

The Airport Zoning Regulations provided, inter alia, *for variances, judicial reviews and changes* (Appendix, A-66, A-67) upon the written application of any affected taxpayer or political subdivision located within the "Airport Hazard Area."

Pursuant to the action for "declaratory judgment, injunction and other equitable relief" in the Court of Common Pleas of Lake County, Ohio, the case was tried before the Honorable Robert Simmons, Judge of the Common Pleas Court of Lake County, Ohio, who, upon the application of the Plaintiffs, made findings of fact and conclusions of law attached hereto and marked Respondent's Appendix 1. As already heretofore stated, the Supreme Court of Ohio sustained the judgment of the trial court.

ARGUMENT

1. Does Chapter 4563 of the Revised Code of Ohio, per se, violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when sections of said Chapter 4563 authorize the creation of Airport Zoning Boards and empower said Airport Zoning Boards to adopt Airport Zoning Regulations imposing certain restrictions upon the height of structures and natural growth in an area designated as "Airport Hazard Area"?

At the outset of this argument it must be pointed out to this honorable Court that the title of the case on the Petition for the Writ of Certiorari is *James Chongris, et al. v. Hugh Corrigan, et al.* In the Supreme Court of Ohio (Appendix, A-1), the title of the case is *Village of Willoughby Hills, et al. v. Hugh A. Corrigan, et al.* This same title appeared in the lower courts (Appendix, A-17, A-30). The reason for the change in the title of the case in this court becomes apparent from a reading of the petition for the writ of certiorari. In the state courts, one of the main contentions for the unconstitutionality of Chapter 4563 of the Revised Code of Ohio was that it conflicted with the "Home rule" powers of the Village of Willoughby Hills, a municipal corporation under Section 3, Article XVIII of the Ohio Constitution (Appendix, A-40). In this petition for the writ of certiorari, it appears that this contention is not raised or pursued and the emphasis in support of the allowance of the writ has been shifted entirely to whether Chapter 4563 of the Revised Code of Ohio and the Regulations adopted pursuant thereto constitute a "taking" of Chongrises' property and are, therefore, unconstitutional. The Supreme Court of Ohio held there was no violation of the "home rule" powers of the Village of Willoughby Hills and that there was no "taking" of Chongrises' property.

In support of granting the writ, petitioner argues that the Supreme Court of Ohio did not comply with the rule of law as pronounced by this Court in *The United States v. Causby,* 328 U.S. 256 (1946) and *Griggs v. County of Allegheny,* 369 U.S. 84 (1962) cases, but that instead, the Supreme Court of Ohio has approved a scheme, the practical effect of which is to authorize the State of Ohio an action which the State of Pennsylvania was denied by the ruling of this Court in the *Griggs* case.

A careful reading, however, of the opinion of the Supreme Court of Ohio, clearly shows that the Court considered both the *Causby* and *Griggs* cases, in reaching its decision. The Supreme Court of Ohio states that in reviewing the facts of the instant case it found that there was no claim made of frequent low flights over Chongrises' land as was involved in the *Causby* and *Griggs* cases, and that the *Causby* and *Griggs* cases were premised upon the actual invasion of the airspace above the land by frequent and low flights. The Supreme Court of Ohio further stated that the same situation existed in the case of *State, ex rel. Royal v. Columbus* (1965), 3 Ohio St. 2d. 154. The syllabus in that case reads:

> "There exists a 'taking' in a constitutional sense of private property for public use under Section 19, Article I of the Ohio Constitution, whenever airflights are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land."

The Supreme Court of Ohio reaffirmed this principle of law as it is clearly shown in the second syllabus of its opinion which provides for injunctive relief and proceedings in Eminent Domain in case the enforcement of the Airport Zoning Regulations would result in an unconstitutional "taking" of Chongrises' property. However, the Supreme Court found that this principle had no application to the facts of this case.

In considering the allegation of the Chongrises that their property suffered a diminution of value because of enactment and enforcement of the Cuyahoga County Airport Regulations, the Common Pleas Court stated the following in its opinion:

> "As for Chongris, the opinion of their expert regarding a land value impairment was extremely speculative. Even so, I choose to admit it into evidence. Yet it is too nebulous to carry weight. No dollar value was assigned to it. Is it a $10.00 impairment, $100.00 or $1000.00? Their present use and enjoyment of the land is in no way affected by either airport operations or zoning. They do not complain of overflights. Some trees exceed the height limitation, but they are exempt as non-conforming growth and no one has threatened to top them.
>
> "Plaintiffs say they want to install a TV tower and believe they cannot do so because of height restrictions. But they have not applied for a permit. And if they do apply, one must be granted for there is 70 feet of air space available for it." (Appendix, A-34.)

The foregoing findings of the Common Pleas Court of Lake County, Ohio show that the Chongrises were not deprived of the use of their property because of the enforcement of the Cuyahoga County Airport Zoning Regulations.

Absent, therefore, *of facts*, to support their contention of "taking" of their property, the only basis of their action is that the enactment of Chapter 4563 of the Revised Code of Ohio, and the Zoning Regulations adopted pursuant to the provisions of said Chapter constitute a *per se* violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The petitioners ignore the existence of provisions of the Constitution of Ohio, and the laws enacted under its authority involving the issue of "taking" private property for public use. It is clear that

both the Constitution and the laws of Ohio do afford the Chongrises a complete and adequate remedy at law and that their rights under the Fifth and Fourteenth Amendments have not been violated. Therefore, the petition for a writ of certiorari must be denied by this Court.

2. Do Airport Zoning Regulations adopted by a County Airport Zoning Board pursuant to the provisions of Chapter 4563 of the Revised Code of Ohio, per se, violate the Fourteenth and Fifth Amendments of the Constitution of the United States, when the facts of the case clearly establish that there has been no immediate or direct interference with the use and enjoyment by the owners of private property located in the area designated as "Airport Hazard Area"?

The Legislature of Ohio, cognizant of the fact that the airplane and the airports are a part of modern environment and have become the main means of passenger transportation in the Country and the State of Ohio, enacted Chapter 4563 of the Revised Code of Ohio entitled "Airports" in order to provide for the safety of the persons who fly the airplanes, the persons who operate and maintain the airplanes and the persons who reside in the vicinity of the airports. In order to carry out this purpose, the Legislature authorized within the provision of Chapter 4563, Revised Code of Ohio, the creation of Airport Zoning Boards and granted them legislative authority to adopt, administer and enforce certain zoning regulations pertaining to areas designated by the said Airport Zoning Boards as "Airport Hazard Areas." That the concern of the Legislature was the safety of the people residing in the vicinity of the airports is manifested by the subheading of Chapter 4563, Revised Code of Ohio, entitled "Safety of persons near airports; airport zoning." (Appendix, A-40.)

The petitioner contends that the regulations adopted by the Cuyahoga County Airport Zoning Board pursuant to the auhority of Chapter 4563 of the Revised Code of Ohio are unconstitutional and that the Supreme Court of Ohio, in upholding them, has authorized the violation of the Fourteenth and Fifth Amendments of the Constitution of the United States. The petitioner disagrees with the holding of the Supreme Court's decision that the Cuyahoga County Airport Zoning Regulations were constitutionally adopted as an exercise of the "police power" of the State of Ohio. In arriving at its decision, the Supreme Court of Ohio applied the same test which the Supreme Court of the United States had applied in the case of *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 397, 71 L. Ed. 303, to wit: whether the regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." In the case of *Village of Euclid v. Ambler Realty Company*, the Supreme Court of the United States stated the following:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a

process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality."

Regarding the proposition whether there is a "taking" of property compensable under the law when regulations pertaining to said property are enacted under the exercise of police power, this Court stated the following in the case of *Interstate Ry. Co. v. Commonwealth, etc.*, 207 U.S. 79:

"Though there is unquestionably a 'taking' under the exercise of police power, yet the taking is not such as is inhibited by or as requires compensation under the constitution."

It is clear, and the Supreme Court of Ohio so stated (Appendix, A-10) that the principles stated by the United States Supreme Court in *Euclid v. Ambler Realty Co., supra,* are equally applicable in the instant case.

In the case of *Jones v. City of Portland, Me.*, 1917, 38 S.Ct. 112, 245 U.S. 217, 62 L. Ed. 252, L.R.A. 1918 C, 765 Ann. Cas. 1918 E, 660, the Supreme Court of the United States stated the following in considering state legislation:

"The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has

peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect."

In the case of *Sayward v. Denny*, Wash, 1895, 15 S.Ct. 777, 158 U.S. 180, 186, 39 L. Ed. 941, 943, the Supreme Court of the United States stated, following the review of decisions of state courts regarding the due process clause:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to review the decision of the state courts upon questions of state law."

In declaring Chapter 4563 of the Revised Code of Ohio and the Cuyahoga County Airport Zoning Regulations valid, the Supreme Court of Ohio applied the rule of law which this honorable Court so clearly stated in the case of *United States v. Causby*, 328 U.S. 256, which reads as follows:

> "The airplane is part of the modern environment of life and the inconvenience which it causes are normally not compensable under the Fifth Amendment. The airplane apart from the immediate reaches above the land is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land."

In connection with the validity of regulations adopted pursuant to lawful authority, the Supreme Court of Florida stated in the case of *Harrell's Candy Kitchen v. Sarasota Manatee Airport Authority*, (Fla. 1959), 111 So. 2d 439:

> "Zoning regulations duly enacted pursuant to lawful authority are presumptively valid, and burden is upon him attacking such regulations to carry the burden of

both alleging and proving that it is unreasonable and bears no substantial relation to the public health, safety and morals of general welfare."

CONCLUSION

We believe that we have heretofore demonstrated that there was no probative evidence before the trial court of Lake County, Ohio, to support the contention of the Chongrises' allegation that their property rights were taken.

The Eleventh Court of Appeals of Lake County, Ohio reversed the decision of the trial court without supporting evidence, holding that Chapter 4563 of the Revised Code of Ohio and the Cuyahoga County Airport Zoning Regulations constituted a *per se* violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The Supreme Court of Ohio, in reviewing the evidence and the law reversed the Court of Appeals and held that Chapter 4563 of the Revised Code of Ohio was constitutional and concluded that the Zoning Regulations in question did not take from the plaintiffs Chongris any "airspace" now owned by them (Appendix, A-14).

We submit that the airplane has become the major means of public transportation and that the inconveniences which it causes are not compensable under the Fifth Amendment of the Constitution of the United States.

We believe that we have heretofore shown compelling reasons both under the applicable laws and the facts in the case why this Honorable Court should deny the writ

sought by the petitioners. The decision of the Supreme Court of Ohio should be permitted to stand since it is completely in accord with the opinions of this Court.

Respectfully submitted,

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APPENDIX 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF TRIAL COURT

No. 49495.

IN THE COURT OF COMMON PLEAS
State of Ohio, Lake County, SS:

VILLAGE OF WILLOUGHBY HILLS
A Municipal Corporation, *et al.*,
Plaintiffs,

vs.

HUGH A. CORRIGAN, *et al.*,
Defendants

Pursuant to Section 2315.22 of the Revised Code of Ohio, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. The Cuyahoga County Airport Zoning Regulations involve in this case the safety of the Aircraft in the air and is intertwined with the safety of persons on the ground.

2. There was no evidence showing that the Village of Willoughby Hills has been hampered or that its interests to develop or control the development of land within its territorial boundaries have been interfered with by the Cuyahoga County Airport Zoning Regulations.

3. The Village of Willoughby Hills chose not to consider zoning changes within the area designated as "Airport Approach Zone" and "transitional" zone.

4. Only one application for an Airport Zoning permit in the Village of Willoughby Hills had been filed with the Zoning Board within the Hazard Area, and that permit was granted.

5. No application for an Airport Zoning permit has been refused in six years.

6. The present use and enjoyment by the Chongris' of their land has not been affected by either the operation of the Airport or by the enactment of the Cuyahoga County Airport Zoning Regulations.

7. The Chongris' did not suffer any loss.

8. Some trees on the Chrongris property exceed the height limitation set forth in the Cuyahoga County Airport Zoning Regulations, but they are exempt as non-conforming growth and no one has threatened to top them.

9. The Chongris say they wanted to install a T.V. Tower but never applied for a permit. If applied for, the permit would have been granted as there is 70 feet of air space available for it.

10. The future use and development of the back land of the Chongris' property for multi-family residential use as claimed, is not prevented by the Cuyahoga County Airport Zoning Regulations. This claim is speculative in the extreme.

CONCLUSIONS OF LAW.

1. Chapter 4563 of the Revised Code of Ohio is a constitutional exercise of state legislative authority and does not violate the Ohio, or the United States Constitution.

2. Chapter 4563 of the Revised Code of Ohio, and the Cuyahoga County Airport Zoning Regulations enacted pursuant thereto, provide for regulations for the operation of public airports and for the safety and the welfare of persons, both above and on the ground, and are, therefore, legitimate matters for state legislation and regulations adopted pursuant thereto.

3. The Cuyahoga County Airport Zoning Regulations impose reasonable restrictions on the private land, and complement without nullifying the Village of Willoughby Hills Municipal Zoning Regulations operating within the perimeter of the Airport Hazard Area, and are constitutionally enacted and in compliance with the statutes of Ohio.

4. Chapter 4563 of the Revised Code of Ohio, and the Cuyahoga County Airport Regulations, enacted pursuant thereto do not interfere with the right of the Village of Willoughby Hills under Article XVIII, 3, Ohio Constitution, to control development of lands and to adopt zoning regulations within its jurisdiction.